

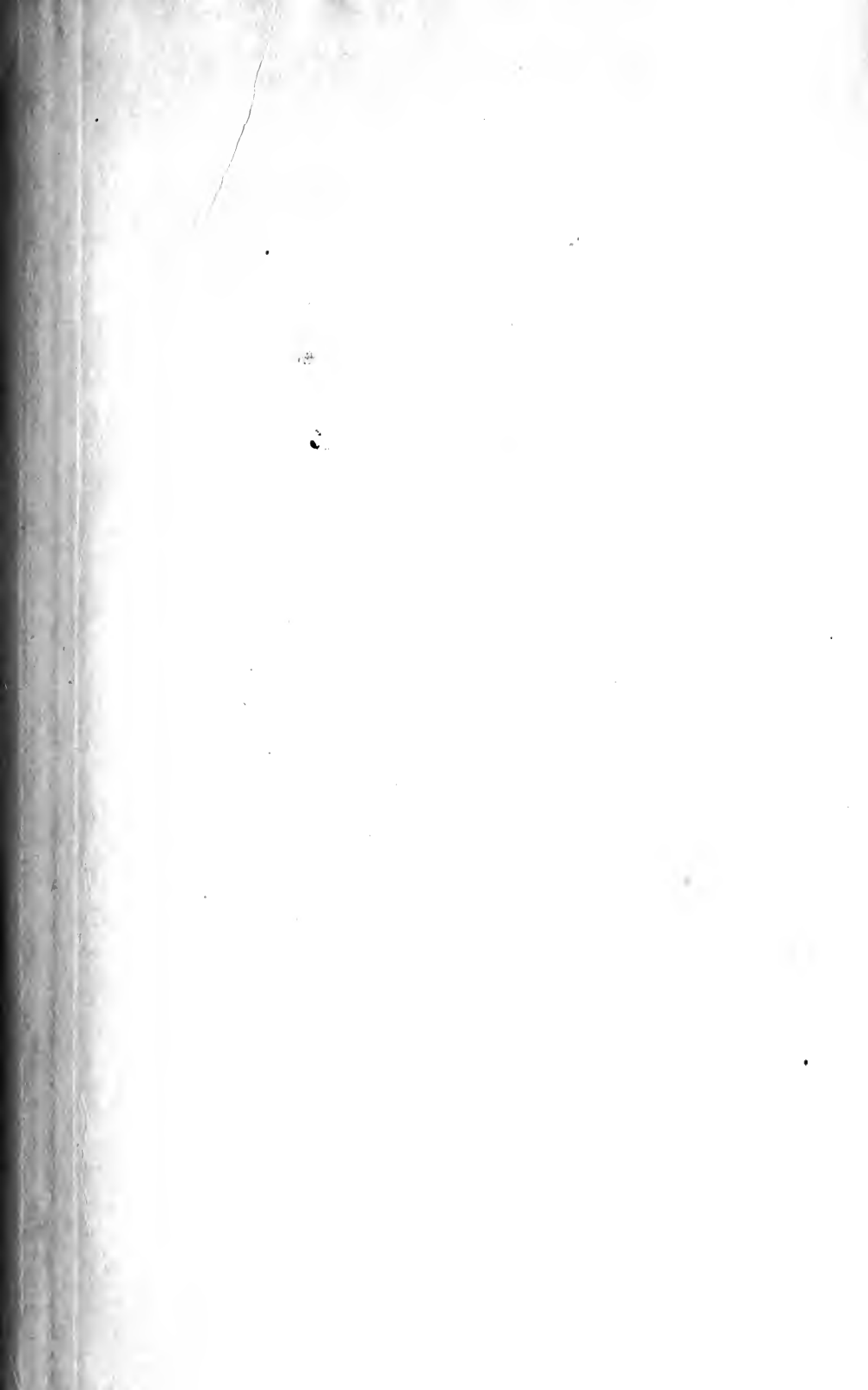
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5)
No. 10251

United States *VR*
Circuit Court of Appeals
For the Ninth Circuit. *2317*

DAVID C. JEFFCOTT and ELSIE JEFFCOTT,
his wife,

Appellants,

vs.

EDWARD J. DONOVAN,

Appellee.

Transcript of Record

In Two Volumes

VOLUME I

Pages 1 to 458

FILED

OCT 12 1942

PAUL P. O'BRIEN,
CLERK

Upon Appeal from the District Court of the United States
for the District of Arizona.

No. 10251

United States
Circuit Court of Appeals

For the Ninth Circuit.

DAVID C. JEFFCOTT and ELSIE JEFFCOTT,
his wife,

Appellants,

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for the District of Arizona.

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ATTORNEYS OF RECORD:

MESSRS. DARNELL & ROBERTSON,
410-13 Valley National Building,
Tucson, Arizona.
Attorneys for Appellants.

LESLEY B. ALLEN, Esquire,
37 North Church Street,
Tucson, Arizona.
Attorney for Appellee. [3*]

In the United States District Court
For the District of Arizona
Civil Action, File No. 54-Tuc.

EDWARD J. DONOVAN,

Plaintiff,

vs.

DAVID C. JEFFCOTT and
ELSIE JEFFCOTT, his wife,
Defendants.

ANSWER

Come now the above named defendants, David C. Jeffcott and Elsie Jeffcott, his wife, and for answer to plaintiff's complaint herein filed, deny and allege as follows:

*Page numbering appearing at foot of page of original certified Transcript of Record.

I.

Admit the allegations contained in paragraph I of plaintiff's complaint.

II.

Admit the allegation contained in paragraph II of plaintiff's complaint, except that the allegation that said plaintiff was giving specialized attention to surgical conditions of infancy and childhood, and as to such allegation said defendants do not have sufficient information upon which to form or express any opinion or belief and therefore require strict proof of such allegation.

III.

Admit the allegation contained in paragraph III of plaintiff's complaint in that in the course of such employment plaintiff made a trip to Tucson, Arizona, on April 1st, 1939, examined said infant and had consultations with the attending physicians of such infant on the 2nd day of April, 1939, and operated upon said infant upon said 2nd day of April, 1939, for certain intestinal obstruction. Said defendants deny that said plaintiff remained in Tucson, Arizona, in attendance upon such [4] infant until its condition became entirely satisfactory, and in that connection allege that said plaintiff left the City of Tucson, Arizona, on the morning of April 3rd, 1939, while said infant was still in an extremely critical condition and that other physicians and surgeons employed by said defendants continued administering treatment to said infant for a period of several weeks subsequent to said date. That in

truth and in fact said infant has never fully recovered and additional future surgical attention must be administered to said child.

IV.

Admit the allegations contained in paragraph IV of plaintiff's complaint to the effect that the condition of such infant prior to such operation was very critical in that it necessitated the performance upon such infant at a very tender age of a difficult, delicate and dangerous surgical operation. Said defendants do not have sufficient information upon which to form or express any opinion or belief as to the special training and experience of the plaintiff in performing the particular operation needed by such infant, or the qualifications of said plaintiff to perform such an operation, and in that connection require full proof of such allegations. Said defendants deny that under the circumstances the professional services provided to the infant son of said defendants, as alleged in said complaint, were of the reasonable value of \$12,500.00, and in that connection said defendants allege that said sum is extremely excessive, unreasonable and exorbitant.

V.

Admit the allegations contained in paragraph V of said plaintiff's complaint that said defendants have paid to said plaintiff the sum of \$2,500.00, but deny that said defendants owe said plaintiff the sum of \$10,000.00, or any other sum of money, and that said sum of money is not a reasonable value of such professional services. [5]

VI.

Said defendants deny each and every other allegation, matter and thing in said complaint contained, except for the portions thereof which have been expressly hereinbefore admitted.

VII.

By way of further answer to said complaint, said defendants allege that the sum of \$2,500.00 was paid by said defendants to said plaintiff on condition that the same be accepted as full accord and satisfaction of the sums of money owing by said defendants to said plaintiff and that said plaintiff accepted said sum of money and thereby released, settled and satisfied all claims held by said plaintiff against said defendants, or either of them. Said defendants allege that the said sum of \$2,500.00 so paid to said plaintiff represented a fair and reasonable fee for the service performed by said plaintiff.

Said defendants further allege that at the time of employment of said plaintiff no agreement was made as to any specific charge that said plaintiff would make for his services to be rendered and that there has never been an account stated between said parties.

Wherefore, said defendants pray that said plaintiff have and recover nothing against said defendants, or either of them, and that they be awarded

judgment against said plaintiff for their costs herein incurred.

DARNELL, PATTEE &
ROBERTSON,
By LAWRENCE V. ROBERTSON,
410 Valley National Building,
Tucson, Arizona,
Attorneys for Defendants
David C. Jeffcott and Elsie
Jeffcott, his wife. [6]

Copy received this 30th day of September, 1940.

LESLEY B. ALLEN
Attorney for Plaintiff
Edward J. Donovan.

[Endorsed]: Filed Sep. 30, 1940. [7]

[Title of District Court and Cause.]

AMENDED COMPLAINT

Comes now the above named plaintiff, Edward J. Donovan, complaining of the said defendants, David C. Jeffcott and Elsie Jeffcott, his wife, and alleges:

I.

That the said plaintiff is a resident of the State of New Jersey;

That the said defendants are both residents of the State and District of Arizona; and

That the matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3000).

II.

That, on or about the 1st day of April, 1939, the said defendants, while acting jointly and severally and through their duly authorized agent or agents at Tucson, Arizona, did employ the said plaintiff, who was then engaged at the City and State of New York in professional practice as a physician and surgeon, giving specialized attention to surgical conditions of infancy and childhood, to come to Tucson, Arizona, within the District aforesaid, by airplane for the purpose of performing a surgical operation upon Robert Jeffcott, the infant son of defendants.

[8]

III.

That, in the course of such employment, plaintiff made a trip to Tucson, Arizona, on or about April 1, 1939, examined the said infant and had consultations with the attending physicians of such infant on the 2nd day of April, 1939, operated upon such infant on such 2nd day of April, 1939, for intestinal obstruction, and remained in Tucson, Arizona, in attendance upon such infant, until its condition became entirely satisfactory.

IV.

That the condition of such infant, prior to such operation, was very critical, in that it necessitated the performance upon such infant, at a very tender

age, of an extremely difficult, delicate and dangerous surgical operation;

That plaintiff, on and prior to such 2nd day of April, 1939, had had special training and experience for and in the performing of the particular operation needed by such infant, which gave plaintiff unusual and eminent qualifications for the performing of such operation; and

That, under such circumstances, the said professional services, provided to the infant son of defendants as hereinabove alleged, were of the reasonable value of Twelve Thousand and Five Hundred Dollars (\$12,500.00).

V.

That defendants have paid to plaintiff the sum of Two Thousand Five Hundred Dollars (\$2,500.00); and that defendants now owe to plaintiff the sum of Ten Thousand Dollars (\$10,000.00), balance of such reasonable value of such professional services.

Wherefore plaintiff demands judgment against the said defendants for the sum of Ten Thousand Dollars, interest and costs.

LESLEY B. ALLEN,

Attorney for Plaintiff. [9]

I hereby acknowledge receipt of copy of the attached Amended Complaint and consent that the same may be filed by plaintiff, all on this 28th day of January, 1942.

LAWRENCE V. ROBERTSON
of counsel for defendants.

[Endorsed]: Filed Jan. 28, 1942. [10]

PLAINTIFF'S EXHIBIT No. 1

New York, May 1, 1939.

Mr. David Jeffcott,
Patagonia,
Arizona.

To EDWARD J. DONOVAN, M.D.

424 Park Avenue

For Professional Services Operation on Baby Jeffcott in Tucson, \$12,500.

Received Payment

[Endorsed]: Admitted and filed Jan. 29, 1942. [11]

PLAINTIFF'S EXHIBIT No. 2

DAVID C. JEFFCOTT

Rail X Ranch

Patagonia, Arizona

May 22, 1939.

Dr. Edward J. Donovan

424 Park Avenue

New York, N. Y.

Dear Dr. Donovan:

Since receiving your statement for \$12,500.00, I have given the matter much careful thought and want to present certain of my reactions for your consideration.

First, I want to express the deep appreciation of myself and my wife for the wonderful service you

have rendered us. Service of this kind cannot be measured in terms of money and we hope you will not misunderstand the true reasons for writing you this letter.

We are not very familiar with the way in which the fee for a service of this kind is determined. However, it is our impression that the fee is to some extent, at least, governed by the ability of the patient to pay, and we feel that perhaps you have misunderstood, or you have been misinformed, as to our financial status. Therefore, we want to give you a brief outline of our position.

Somewhat over a year ago we purchased a cattle ranch and started in the livestock business. The value of our real estate, cattle and equipment totals roughly about \$150,000.00. Against this total we owe a debt of about \$50,000.00 which must be retired over a period of about 15 years. This investment constitutes our entire wealth except for a few minor assets totaling not over \$2500.00.

Our entire income is derived from the sale of cattle produced on the ranch and since we are now just in process of building up our herd, sales will be small for several years. Our gross income for 1939 will not exceed \$8000.00 against which will be operating costs amounting to about \$11,000.00. Hence, we will have to borrow this year an additional amount of \$3,000.00 in addition to our family living expense. Within three years our net income will probably reach about \$5000.00 and there is no probability of its exceeding [12] \$8000.00 at any fu-

ture date. From this net income we must meet our living costs and retire the above mentioned indebtedness.

You are no doubt aware of the fact that serious complications followed the operation which necessitated holding the baby in the hospital for over six weeks. The care of my wife was nominal, but the medical fees, nurses, *hopital*, etc. on the baby alone already exceed \$2500.00 and it is still necessary to retain a nurse—and this will continue for some time to come.

You can readily see that we have a financial burden which worries us greatly.

We desire to meet our obligations as promptly as is possible within our ability to pay, but we would appreciate greatly hearing from you further and to have your reactions in the light of the above information.

We will be glad to furnish you with a detailed financial statement or to give you any further information you may care to request.

Sincerely yours,

DAVID C. JEFFCOTT.

[Endorsed]: Admitted and Filed Jan. 29, 1942.

[13]

PLAINTIFF'S EXHIBIT No. 3

DAVID C. JEFFCOTT

Rail X Ranch

Patagonia, Arizona

August 14, 1939.

Dr. Edward J. Donovan

424 Park Avenue

New York, New York

Dear Dr. Donovan:

Dr. Hamblin has advised me of the results of the meeting you suggested, but while I appreciate your offer to reduce your bill to \$7500—it is just as impossible for me to meet as your original figure.

From what Dr. Hamblin writes you are under a misapprehension on several points:

First: that there were numerous opportunities for me to have talked over the fee with you in Tucson. Funny you should feel that way when I, on the other hand, felt hurt that we hadn't been able to have a talk with you. I wanted to meet you at the plant at your arrival, but the doctors here would not allow it. If you will remember, the only time I saw you was shortly after the operation when you were in conference with the other doctors present, with whom you had engagements for the rest of the day. You had planned to leave Monday night and I arranged to be back from the ranch to see you Monday morning, but upon my arrival found to my disappointment that you had already left.

Second: as to the size of the room in which you found the baby, the Desert Sanatorium has no nursery and when there is an obstetrical case an empty room is given over to the baby and no charge made for it. The day before you arrived we were told he must be moved to a room at the other end of the building where his constant crying would not disturb very ill patients nearby, and where they would not be annoyed by the general activity in and out of his room day and night. And as to the two nurses at a time, the doctors claimed it was imperative because of the intravenous and all the other administrations to keep him alive and to get him in shape for the operation, and I am [14] sure they will not agree with you they were unnecessary. They also looked after the mother.

Third: of course my wife would have been glad to have saved the expense of the nurse coming home with the baby but being inexperienced in operations she naturally felt she had to take the advice of the Sanatorium's doctors who were in charge of the baby. We both agree with you that it was a needless expense and immediately we realized it we dispensed with her services.

Also, if I had been more experienced I would surely have had your fee settled in advance, to learn if I could afford it, instead of taking the recommendations of the local doctors—but even at that I can hardly be blamed for not anticipating what it

proved to be when a number of the highest standing members of the profession in Tucson with whom the matter has been discussed differ so much from your ideas. Their opinions varied as to what your bill should be but the highest figure of any was \$2500, and all agreed that the top figure a lawsuit out here would bring was not more than that.

I feel very unhappy that any question of cost should enter into what you did for our baby. And it seems to me unappreciative that you should not promptly have received any payment, so I have managed to secure the highest figure the local doctors named and enclose herewith check for \$2500. We have thereby freed our consciences and if you choose to sue for any more I cannot help it for I have done my best and my situation has been explained to you. Of course, if things ever broke right for me and I could properly afford it I would like to do some more for you in order that you would think as well of us as we did toward you.

Hoping you can see this matter as we do I am,

Yours sincerely,

DAVID C. JEFFCOTT. [15]

[Endorsed]: Admitted and filed Jan. 29, 1942. [16]

PLAINTIFF'S EXHIBIT No. 4

DAVID C. JEFFCOTT

Rail X Ranch

Patagonia, Arizona

March 2, 1940

Mr. Arthur T. Schmidt

92 Liberty Street

New York, N. Y.

Dear Sir:

Because it seemed to me that my letter of August 14th last fully covered the matter, and because I wanted to think the matter over further, I failed to reply to your letter of December 6th last. Your letter of February 10th seems to intimate that my August 14th letter was not clear. Of course I want the matter amicably adjusted—that was the reason for my sending Dr. Donovan check for \$2500, when my advisors were telling me that such an amount was a considerable overcharge.

To set you right on the matter—the only reason that Dr. Donovan was asked to come was because he was recommended by two Doctors at the Desert Sanatorium who had worked under him. Undoubtedly there were others nearer and even on the Coast who could have done the same thing, but not personally knowing them I accepted the recommendations of the San. Doctors.

Contrary to your advice there was no feeling that the child couldn't go to New York or elsewhere, but it seemed easier and more satisfactory for the Doc-

tor to come here than for the child and a nurse to go to the Doctor.

Your mention of the hazard of travel by air is not borne out by the accident Insurance Companies' experience—they find it safer than travel by automobile—and I assume Dr. Donovan does not eschew the automobile because of its hazard. My Mother travels out here by air in preference to train and greatly enjoys it.

My suggestion that if things came my way sometime I would do more for Dr. Donovan was due solely to my desire to have Dr. Donovan's goodwill by coming nearer to his ideas—my own ideas are that the check I sent was ample. [17]

I expect to give Dr. Donovan the opportunity for another fee when in due course the time comes to operate on the boy again for the fistula and the hernia which resulted from the operation.

As I explained to Dr. Donovan I am a young man in process of trying to make a livelihood for my family and am heavily in debt to my Father and Mother, and have done all I can feel I should in this matter—and I suggest that Dr. Donovan would be showing the right spirit in deciding **not only to live—but to let live.** And I and others will be disappointed in him if he doesn't.

Yours truly,

DAVID C. JEFFCOTT.

[Endorsed]: Admitted and filed Jan. 29, 1942. [18]

PLAINTIFF'S EXHIBIT No. 5

ARTHUR T. SCHMIDT

Attorney at Law

92 Liberty Street, New York

Rector 2—6292

December 6th, 1939

Mr. David C. Jeffcott,
Rail X Ranch,
Patagonia, Arizona.

My Dear Mr. Jeffcott:

Dr. Edward J. Donovan has conferred with me regarding the unfortunate situation which has arisen out of the facts connected with the recent operation performed upon your infant son. Dr. Donovan believes that the matter has reached a point where both you and he are desirous of concluding some satisfactory settlement and feels as I do that the situation has occurred due to a misunderstanding of the whole picture. He has asked me to communicate with you for the sole purpose of trying to bring about an amicable and pleasant settlement of the matter. With this purpose in mind, I think it would not be amiss if I review the fundamental facts involved, believing that a third party can often obtain a more accurate picture than the individuals who are interested and involved in the issues.

The condition of your son at the time that the operation became necessary was, I am informed, an unusual one and only a very limited and select

group of surgeons had had any experience with such a situation. Of this group, it is my belief, obtained from sources other than Dr. Donovan, that he was the most successful and eminent. The desire of your doctor and of yourself to have the very best specialist and surgeon perform this operation is not only easily understood but it is decidedly commendable. I feel as you have expressed yourself in one of your letters that the life of your infant son cannot be measured in figures and I have no doubt that you still feel that the choice of surgeon which you made was a wise one. The baby's condition was such that immediate action had to be taken and was so precarious that you did not feel that it was safe to bring the patient to New York and you therefore requested Dr. Donovan to come to Arizona forthwith. Your decision to do this I have no doubt was a difficult one and probably is responsible for saving your son's life. Pursuant to your request Dr. Donovan [19] flew to Arizona. The hazard connected with a flight for a man of Dr. Donovan's preeminence and for the further reason that he has a considerable family of his own was certainly not one that he would ordinarily be expected to take and must have met at the time at least with a feeling of appreciation by you and your family. The operation was a success and due to Dr. Donovan's expeditious flight was timely.

The fee that Dr. Donovan charged in this matter is one that he deemed fair and is one that several disinterested surgeons in this city deem entirely

proper. I note that you have paid the sum of \$2500. with the statement that the consensus of opinion of the doctors in your vicinity seems to fix that amount as a proper fee and with the further statement that if in the future you are in a position to pay more you will do so. The fact that the local doctors have led you to this opinion must have been of importance to you in making this decision but the fact remains that it was not your desire that any of these surgeons should perform the operation but that you did desire the best available surgeon to do so. I do not believe that the opinion of these doctors as to the value of the services rendered should be a controlling force. The further fact that you state that when you are in a position to do more you would do so would seem to indicate that you also feel that Dr. Donovan has not received proper compensation. It may be that you are measuring Dr. Donovan's services by your ability to pay at the present moment rather than by the actual value of the services rendered and of your son's health. I come to this conclusion from the tenor of your letters.

I believe that with a fair approach to this problem a satisfactory solution to all involved can be reached, and if the want of immediate finances is the obstacle may I suggest that perhaps some arrangement can be made for payment of this bill in such reasonable installments spread over such a period of time as would be satisfactory to both parties.

This letter considerably longer than I originally

intended and I must attribute its undue length to the fact that I am extremely desirous of reaching a friendly solution to the matter and I hope you will approach the problem with the same mind. It seems to me that if you keep in mind [20] the facts which affect each side of this discussion a spirit of fairness will point the way to the solution.

Trusting that I shall hear from you in the very near future with your suggestions regarding the same, I am,

Sincerely yours,

ARTHUR T. SCHMIDT.

ATS:mvd

[Endorsed]: Admitted and filed Jan. 29, 1942. [21]

[Title of District Court and Cause.]

STIPULATION IN RE PLAINTIFF'S
EXHIBIT No. 6

It Is Hereby Stipulated between the undersigned attorneys for the respective parties herein that this stipulation be incorporated in the record on appeal of this cause in lieu of plaintiff's Exhibit No. 6 in evidence, for the reason that it is impracticable for said Exhibit to be printed as a part of said record in view of the many pictures, diagrams and drawings that are contained in said Exhibit.

Plaintiff's Exhibit No. 6 is a pamphlet containing a reprinted article from the American Journal

of Diseases of Children published in January 1939, which is entitled "Disturbances of Rotation of the Intestinal Tract" and written by Rustin McIntosh, M.D. and Edward J. Donovan, M.D. The pamphlet sets forth the observations of the two authors of twenty cases where there were disturbances of rotation of the intestinal tract. Pictures of these various cases, x-ray prints and drawings are set forth in conjunction with each of these cases. A diagnosis, discussion of treatment and comments of the authors are made in connection with each of said cases. The authors also generally discuss the symptoms, operative treatment and other phases of disturbances of rotation of the intestinal tract.

It Is Hereby Further Stipulated that plaintiff's Exhibit No. 6 be not transmitted to the Clerk of the Circuit Court of [22] Appeals at the time the transcript of record is forwarded.

Dated this 31st day of July, 1942.

LESLEY B. ALLEN,
37 North Church,
Tucson, Arizona,
Attorney for Plaintiff.

DARNELL & ROBERTSON,
410 Valley National Building,
Tucson, Arizona,
Attorneys for Defendants.

By LAWRENCE V. ROBERTSON,
Member of the Firm.

[Endorsed]: Filed Aug. 19, 1942. [23]

PLAINTIFF'S EXHIBIT No. 7

THE DESERT SANATORIUM

of

SOUTHERN ARIZONA

April 29, 1939

Tucson

Dr. Edward J. Donovan

424 Park Avenue

New York City

Dear Doctor Donovan:

Baby Jeffcott continues to improve. His weight is now seven pounds, eight ounces. There has been no fecal drainage and only a very small amount of fluid coming from his wound in the past 24 hours.

Yours sincerely,

HUGH C. THOMPSON, JR.,

(M.D.)

Associate Physician.

[Endorsed]: Admitted and filed Feb. 3, 1942. [24]

PLAINTIFF'S EXHIBIT No. 8

THE DESERT SANATORIUM

of

SOUTHERN ARIZONA

April 26, 1939

Tucson

Dr. Edward J. Donovan

424 Park Avenue

New York, N. Y.

Dear Doctor Donovan:

Your letter of April 24th has been received. Baby Jeffcott has made very excellent progress during the past week. He has gained about one pound, is taking feedings well and without any vomiting, and is having normal stools. The fistula is steadily decreasing in size and now admits a probe only with difficulty. As far as I can see, there is no mucosa present in the wound. The amount of drainage from the wound is very small compared to what it formerly was. We are all very encouraged about him.

The name of the baby's father is David Jeffcott and his address is Patagonia, Arizona.

I extend my personal regards to you and my other friends in New York.

Yours sincerely,

HUGH C. THOMPSON, Jr.,

Associate Physician.

Enclosure

[Endorsed]: Admitted and filed Feb. 3, 1942. [25]

DEFENDANT'S EXHIBIT A

DAVID C JEFFCOTT—RAIL X RANCH

FINANCIAL TOTALS 2/2/42—DJ.

	1937	1938	1939	1940	1941
Income from Ranch Sales	25.00	3,758.37	6,183.61	11,548.06	16,585.34
Increase In Cattle Inventories			10,749.21	3,010.04	9,574.82
Total Increase & Income	25.00	3,758.37	16,932.82	14,558.10	26,160.16
Ranch Expenses	3,584.86	18,330.74	17,362.91	16,341.60	27,491.49
Losses	3,559.86	Loss 14,572.37	Loss 430.09	Loss 1,783.50	Loss 1,331.33
Dividends		403.22	130.00	130.00	90.00
Personal Expenses		15,572.72	12,983.47	6,305.32	6,277.82
		(5,517.57—Inc tax)			
Cattle Purchases	30,312.50	13,362.64			

[Endorsed]: Admitted and filed Feb. 2, 1942. [26]

In the United States District Court
For the District of Arizona

November 1941 Term

At Tucson

Minute Entry of

MONDAY, MARCH 23, 1942
(Tucson Division)

Honorable Albert M. Sames, United States District Judge, Presiding.

Civ-54

[Title of Cause.]

It Is Ordered that defendants' objections to the depositions of plaintiff's expert witnesses, Dr. Downs, Dr. Burdick and Dr. Beekman, and the questions therein propounded and the answers thereto be overruled, and

It Is Ordered that plaintiff's objections to the foundational and hypothetical questions propounded to defendants' expert witnesses, Dr. Carrol, Dr. Gore and Dr. Holbrook, be overruled.

It Is Further Ordered that judgment be entered for the plaintiff and against the defendants as follows: amount of fees allowed plaintiff, \$7,500.00; credit by payment thereon \$2,500.00; recovery \$5,000.00, and

It Is Ordered that counsel prepare and submit findings of fact and conclusions of law and form of judgment. [27]

NOTICE TO COUNSEL OF JUDGMENT

DEPARTMENT OF JUSTICE
UNITED STATES DISTRICT COURT

Office of the Clerk
District of Arizona
Tucson, Arizona

March 23, 1942

Leslie B. Allen, Esq.
Hoff Building,
Tucson, Arizona

Messrs. Darnell, Pattee & Robertson,
Valley National Building,
Tucson, Arizona

Re: Civ-54-Tucson, Edward J. Donovan
vs. David C. Jeffcott, et ux.

Gentlemen:

You are advised that the court today ordered in the above entitled case that defendants' objections to the depositions of plaintiff's expert witnesses Dr. Downs, Dr. Burdick and Dr. Beekman and to the questions therein propounded and the answers thereto be overruled; that plaintiff's objections to the foundational and hypothetical questions propounded to defendants' expert witnesses Dr. Carroll, Dr. Gore and Dr. Holbrook be overruled; that judgment be entered for plaintiff and against defendants,—amount of fees allowed plaintiff, \$7500.00; credit by payment thereon, \$2500.00; recovery,

\$5000.00; counsel to prepare and submit findings and form of judgment.

Very truly yours,

EDWARD W. SCRUGGS,

Clerk

By HUGH M. CALDWELL,

Hugh M. Caldwell, Deputy [28]

[Title of District Court and Cause.]

FINDINGS OF FACT; CONCLUSIONS OF LAW AND ORDER DIRECTING JUDGMENT

The Above Entitled Cause having come on regularly for trial before the above entitled court, upon the facts and without a jury, on the 29th day of January, 1942; the said cause having been tried by the court, upon the facts and without a jury, on the 29th, 30th and 31st days of January, 1942, and upon the 2nd and 3rd days of February, 1942; and said cause having been taken under advisement by the said court on the said 3rd day of February, 1942, Now, Therefore,

The Court Does Find the Facts, specially, as follows:

I.

That the plaintiff, Edward J. Donovan, was a resident of the State of New Jersey at the time he filed his complaint herein;

II.

That the defendants, David C. Jeffcott and Elsie Jeffcott, his wife, were both residents of the State of Arizona at the time of the filing of such complaint;

III.

That the matter in controversy in such action, exclusive of interest and costs, exceeds the sum of Three Thousand Dollars.

IV.

That, for a long period of time prior to and including the 31st day of March, 1939, said plaintiff had been engaged, at the City and State of New York, in professional practice as a [29] physician and surgeon, giving specialized attention to surgical conditions of infancy and childhood;

V.

That, on or about the 31st day of March, 1939, Robert Jeffcott, the infant son of said defendants, then being about seven days old, was diagnosed by his attending physicians, at Tucson, Arizona, as suffering from a complete intestinal obstruction.

VI.

That, on or about such 31st day of March, 1939, the said attending physicians of such infant decided that a surgeon having specialized and outstanding training, experience and skill, in performance of the operation for correction of intestinal obstruction

in the newborn, should be employed by defendants to operate upon the said Robert Jeffcott;

VII.

That such attending physicians, then and thereupon, suggested to defendants that they employ plaintiff to perform such operation upon the infant son of defendants;

VIII.

That defendants, thereupon and on or about said 31st day of March, 1939, instructed Dr. Hugh C. Thompson, one of such attending physicians of such infant, to act on their behalf in employing plaintiff to perform such operation upon their said son.

IX.

That the said Hugh C. Thompson, then and pursuant to such instructions, arranged that plaintiff would perform such operation upon such infant at Babies Hospital in New York City on the 1st day of April, 1939, it being contemplated and arranged that such infant, accompanied by necessary medical and nursing attendants, should be flown to New York City by airplane.

X.

That, shortly thereafter and on said 31st day of March, 1939, [30] the said defendants advised the said Hugh C. Thompson that they desired and were instructing him to make further employment arrangements with plaintiff, under which plaintiff should fly forthwith to Tucson, Arizona, in order to perform such operation there instead of at New York

City; and that defendants did then advise the said Thompson that money was no object to them in the matter of arranging and making such employment of plaintiff;

XI.

That the said Hugh C. Thompson, pursuant to such instructions and on said 31st day of March, 1939, did negotiate with plaintiff the second time, relative to his employment by defendants, did advise him that defendants desired that he fly forthwith to Tucson, Arizona, to perform such operation, and, in connection therewith, did advise plaintiff that defendants had stated that money was no object;

XII.

That plaintiff thereupon accepted such employment by defendants and agreed to proceed to Tucson, Arizona, by airplane, and to operate upon such infant at Desert Sanatorium, Tucson, Arizona, where such infant was then hospitalized;

XIII.

That such defendants desired and negotiated such change in the employment of plaintiff because they felt that plaintiff's coming to Tucson, Arizona, to there perform such operation, would disturb the orderly routine of fewer people;

XIV.

That, pursuant to such employment and on said 31st day of March, 1939, plaintiff departed from

State of New Jersey by airplane and arrived at Tucson, Arizona, during the forenoon of Sunday, the 1st day of April, 1939;

XV.

That, after arriving at Tucson, Arizona, and on said 1st day [31] of April, 1939, plaintiff examined such infant and the available X-rays, held consultations with the attending physicians of such infant and performed an abdominal operation upon such infant for the correction of intestinal obstruction;

XVI.

That, in the course of performing such operation, plaintiff did find and diagnose that such infant was suffering from congenital malformation of the intestinal tract and from malrotation of the small intestine, resulting in complete obstruction;

XVII.

That, in the course of performing such operation, plaintiff did correct such condition of malformation, malrotation and obstruction by bringing the cecum of such infant down to its normal position, by cutting away a band on the ileum of such infant, by untwisting the volvulus and turning all of the small intestine of such infant about two and one-half turns in a counter-clockwise direction, by attaching the cecum of such infant to the parietal peritoneum in the right lower quadrant of the abdomen, where it belonged, and by closing the abdomen in layers;

XIX.

That, upon completion of such operation, plaintiff caused such infant to be immediately transfused and then to be given a continuing infusion of glucose and saline until infusion was no longer needed;

XX.

That plaintiff thereafter remained at Tucson, Arizona, in continued attendance upon such infant, for approximately twenty-four hours and until it had become apparent to plaintiff that such infant no longer required his specialized surgical care;

XXI.

That plaintiff then returned to New Jersey by airplane and arrived at his New York office during the afternoon of April 3, 1939; [32]

XXII.

That plaintiff thereafter communicated with and extended advice to said Hugh C. Thompson, one of the attending physicians of such infant, in the course of post-operative care;

XXIII.

That such operation was successful in correcting such obstruction, in that such infant survived such operation with apparent normal functioning of the intestinal tract;

XXIV.

That such operation was successful in correcting such congenital malformation, in that an X-ray of

the intestinal tract of such infant, made on October 1, 1939, indicated that the cecum and colon of such infant were then in normal position;

XXV.

That the matter of the amount to be charged by plaintiff for his professional services in performing such operation was not discussed by plaintiff and the said Hugh C. Thompson in the course of the said negotiations for the employment of plaintiff;

XXVI.

That the amount to be charged by plaintiff for such professional services was not discussed by plaintiff and defendants at any time prior to rendition of statement, by plaintiff to defendants, on or about May 1, 1939;

XXVII.

That the condition of such infant, prior to such operation, was very critical, in that it necessitated the performance upon such infant, at a very tender age, of an extremely difficult, delicate and dangerous surgical operation;

XXVIII.

That said plaintiff, prior to said 1st day of April, 1939, had had special and extensive training and experience in caring for surgical conditions of infancy and childhood, had had an unusual [33] and outstanding degree of experience in performing the operation, upon newborns and infants, for correction of complete intestinal obstruction, and had attained

some national recognition and prominence in such field of pediatric surgery;

XXIX.

That the said defedants, at the time of employment of said plaintiff and at the time of the performance of such operation, were of substantial worth;

XXX.

That the personal expenditures of such defendants, for the year 1939, were in excess of Twelve Thousand Dollars, and, for the year 1938, were in excess of Fifteen Thousand Dollars;

XXXI.

That the reasonable value of the said professional services of plaintiff, in performing such operation upon the infant son of such defendants under such circumstances, amounts to the sum of Seven Thousand Five Hundred Dollars (\$7,500.00); and

XXXII.

That defendants have paid to plaintiff, on account of such professional services, the sum of Two Thousand Five Hundred Dollars (\$2,500.00).

Wherefore, the court does state separately its conclusions of law thereon, as follows:

I.

That the said court had and has proper and lawful jurisdiction of such cause;

II.

That the said Hugh C. Thompson was acting as the lawful agent for and on behalf of said defendants, and within the scope of his agency, in negotiating for and arranging the employment of plaintiff to operate upon the infant son of defendants at Tucson, Arizona, for the correction of intestinal obstruction; [34]

III.

That the amount to be charged by plaintiff, for his professional services in performing such operation, was not determined by any contract between plaintiff and defendants; and

IV.

That defendants, by virtue of such employment of plaintiff and by virtue of plaintiff performing such operation upon the infant son of defendants, became jointly and severally indebted to plaintiff in the amount of the reasonable value of the professional services of plaintiff, in accepting such employment and performing such operation, such reasonable value being in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00); and

The defendants having paid to plaintiff the sum of Two Thousand and Five Hundred Dollars (\$2,500.00) on account of such indebtedness,

The Court Hereby Directs that formal judgment be made and entered in such cause, in favor of plaintiff and against the defendants and each thereof, for the sum of Five Thousand Dollars (\$5,000.00),

together with interest thereon at the rate of six per cent (6%) per annum from entry of judgment until paid, and for plaintiff's costs herein expended, with like interest.

Made and Entered Herein this day of
....., 1942.

.....
Judge of United States Dis-
trict Court, District of
Arizona

The foregoing draft of findings, conclusions and order directing entry of judgment is respectfully filed herein this 25th day of March, 1942.

LESLEY B. ALLEN,
Attorney for plaintiff.

Copy received March 25, 1942.

DARNELL, PATTEE &
ROBERTSON
Of counsel for defendants.

[35]

[Endorsed]: Filed Mar. 25, 1942. [36]

[Title of District Court and Cause.]

REQUEST FOR FILING OF OBJECTIONS
AND AMENDMENTS TO FINDINGS OF
FACT AND FOR ORAL ARGUMENT

Request is hereby made that the objections and offered amendments to findings of fact heretofore filed by the defendants in the above entitled cause

be duly filed herein and that the same be set for hearing and settlement on Monday, April 6, 1942, at ten o'clock A. M. in the above court and that oral argument may be had in connection therewith.

Dated this 30th day of March, 1942.

Respectfully submitted,

DARNELL, PATTEE &

ROBERTSON,

By LAWRENCE V. ROBERTSON

ABBIE Y. HOLESAPPLE,

410 Valley National Building,

Tucson, Arizona.

Attorneys for Defendants.

Copy received this 30th day of March, 1942.

LESLEY B. ALLEN,

Attorney for Plaintiff.

By JOHN A. BRUNING

[Endorsed]: Filed Mar. 30, 1942. [37]

[Title of District Court and Cause.]

OBJECTIONS TO FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Come now the above named defendants and object to the proposed findings of fact submitted and filed by the above named plaintiff on the 25th day of March, 1942, as follows, to-wit:

I.

Object to that portion of Paragraph X of proposed findings of fact commencing on line 5 on page

3 and reading as follows, to-wit: "and that defendants did then advise said Thompson that money was no object to them in the matter of arranging and making such employment of plaintiff;" This objection is made for the reason that it is contrary to the testimony of Mr. Jeffcott, which testimony was in substance that he told Dr. Thompson when he was asked if money was any object "nothing within reason."

II.

Object to Paragraph XI upon the ground that any representations made by Dr. Thompson to Dr. Donovan which were contrary to the authority given Dr. Thompson is not binding upon the defendants, even if Dr. Thompson be an agent of the defendants; the testimony in fact shows that Dr. Thompson was an independent contractor.

III.

Object to findings contained in Paragraph XIII for the reason that the same is immaterial and is contrary to the testimony of Mr. Jeffcott. The rea-

[38]

son for requesting Dr. Donovan to come to Tucson was because he thought it would be better for the baby and it would be no more expensive than to take the baby and attendants to New York.

IV.

Object to findings contained in Paragraph XXIX for the reason that the statement is a conclusion and does not fairly present the facts as to defendants' financial worth at the time of said employment.

These particular findings are the most important facts to be adduced from the testimony in the case as the reasonableness of the charge must be predicated upon these facts.

V.

Object to the findings contained in Paragraph XXX for the reason that the same are immaterial and for the additional reason that the facts as stated are misleading. The testimony of Mr. Jeffcott was that over Six Thousand Four Hundred Dollars (\$6,400.00) of his expenditures in 1939 was for medical and hospital fees and that his expenditures for 1938 were large in view of the fact that he was getting established on the ranch, was making improvements and repairs to the dwelling in which he lived, buying furniture and household appliances, incurred traveling expenses and other charges. All of these facts are immaterial as they were not figured in any way in showing the income from his assets. The fact that he also lost over Three Thousand Dollars (\$3,000.00) from ranch operations in 1939 did not include any of his personal expenses.

VI.

Object to the finding contained in Paragraph XXXI that the reasonable value of professional services of the plaintiff in performing such operation upon the infant son of such defendants under such circumstances amounts to the sum of Seventy-Five Hundred [39] Dollars (\$7,500.00) for the reason that said finding is contrary to law and to the facts

in the case, is disproportionate to the financial circumstances of the defendants and constitutes an unreasonable and excessive charge of the plaintiff. It constitutes a charge of over ten (10) per cent of the defendants' net worth for the services performed.

VII.

Defendants object to proposed conclusions of law No. II for the reason that the evidence shows that Hugh C. Thompson was acting as a doctor and an independent contractor at the time in question.

VIII.

Defendants object to that portion of conclusions of law No. IV commencing on line 12 and reading "the sum of Seven Thousand Five Hundred Dollars (\$7,500.00)" for the reasons that such conclusion is contrary to law and to the facts and evidence offered in the case and is unreasonable and excessive compensation for the services performed.

IX.

Defendants object to that portion of the courts order commencing on line 19 of page 7 and reading as follows: "for the sum of Five Thousand Dollars (\$5,000.00)" for the reason that said sum is excessive and unreasonable and is not sustained by the law or evidence in the case.

OFFERED AMENDED AND ADDITIONAL
FINDINGS OF FACT

I.

In lieu of Paragraph XXIX defendants request the court to find as follows: "That the said defendants at the time of such employment were engaged in building up a ranch property in southern Arizona which had been purchased approximately one year prior thereto, said ranch then being in its formative stage and having a gross value of approximately One Hundred Fifty Thousand Dollars [40] (\$150,000.00) subject to an indebtedness in the amount of Seventy-five Thousand Dollars (\$75,000.00); and that during the year of 1939 the operation expenses of the ranch not including the personal expenses of the defendants amounted to approximately Eleven Thousand Dollars (\$11,000.00) and the gross income from the operation of the ranch was approximately Eight Thousand Dollars (\$8,000.00); and that said defendants owned a few stocks and bonds which produced an income in 1939 of One Hundred Thirty Dollars (\$130.00); and that said defendants had no other assets or source of income; and that said ranch has been improved by said defendants to the point that in 1942 at the time of the trial of this case said ranch had a gross value of approximately One Hundred Ninety-eight Thousand Dollars (\$198,000.00) subject to mortgage indebtedness of approximately One Hundred Twenty-seven Thousand Dollars (\$127,000.00) and would produce a net income of approximately Five Thou-

sand Dollars (\$5,000.00), which said net income might be increased to a possible Eight Thousand Dollars (\$8,000.00) by the year of 1943.”

II.

Said defendants request an additional finding of fact to be No. XXXIII and read as follows, to-wit: “That the plaintiff’s gross earnings during 1939 amounted to Forty Thousand Eight Hundred Eighty-seven and 05/100 Dollars (\$40,887.05), which said earnings included the sum of Two Thousand Five Hundred Dollars (\$2,500.00) paid by the defendants herein.”

III.

Defendants request as an additional finding of fact to be No. XXXIV the following: “That the plaintiff had performed eighteen operations of the nature of that performed upon the Jeffcott baby and for which he had received the following compensation: fourteen no charge; one Two Hundred Fifty Dollars (\$250.00); one Three Hundred Fifty Dollars (\$350.00); one One [41] Thousand Dollars (\$1,000.00); one Two Thousand Five Hundred Dollars (\$2,500.00).”

IV.

Defendants request as an additional finding of fact to be No. XXXV the following: “That the financial ability of a patient to pay is used as one of the important elements to be considered in fixing a charge for professional services by surgeons and doctors in New York City and by surgeons and doctors in Tucson, Arizona.”

Wherefore, said defendants pray that the foregoing objections to plaintiff's offered findings of fact and conclusions of law be sustained and that the foregoing offered amendments to said findings of fact be granted, and that the court modify its decision herein by substantially reducing the amount to be determined as reasonable compensation for plaintiff's services, and for such other order in the premises as the court shall deem meet and just.

DARNELL, PATTEE &
ROBERTSON,
By LAWRENCE V. ROBERTSON
ABBIE Y. HOLESAPPLE,
410 Valley National Building,
Tucson, Arizona.
Attorneys for Defendants.

[42]

Copy received 3/27/42.

LESLEY B. ALLEN.

[Endorsed]: Filed Mar. 27, 1942. [43]

In the United States District Court
For the District of Arizona

November 1941 Term

At Tucson

Minute Entry of

MONDAY, APRIL 6, 1942
(Tucson Division)

Honorable Albert M. Sames, United States District Judge, Presiding.

Civ. 54

[Title of Cause.]

This case comes on regularly for hearing this day for settlement of findings herein. Leslie V. Allen, Esquire, appears as counsel for the Plaintiff. Lawrence V. Robertson, Esquire, appears as counsel for the defendants.

Plaintiff's proposed findings and defendants objections and requested amendments thereto are now duly argued, and

It Is Ordered that plaintiff reengross plaintiff's proposed findings 29 and 30 into the findings of fact, giving a resume of defendants' financial standing; and

It Is Ordered that defendants' proposed amendment No. 1 be and it is disallowed.

It Is Ordered that defendants' proposed amendments Nos. 2 and 9 be allowed and that the remaining proposed amendments be disallowed, and

It Is Further Ordered that the objections of the defendants be overruled and that counsel for the

plaintiff reengross findings of fact and conclusions of law and serve a copy thereof on counsel for the defendants. [44]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Above Entitled Cause having come on regularly for trial before the above entitled court on the 29th day of January, 1942; the said cause having been tried by the court, upon the facts and without a jury, on the 29th, 30th and 31st days of January, 1942, and upon the 2nd and 3rd days of February, 1942; the said cause having been taken under advisement by the court on the said 3rd day of February, 1942; the court's decision having been rendered on March 23, 1942; a draft of findings having been prepared and filed by counsel for plaintiff, pursuant to rule; objections and proposed amendments having been prepared and filed by counsel for defendants; and the matter of the findings having been duly settled by the said court on the 6th day of April, 1942, Now, Therefore,

The Court Does Find the Facts, specially, as follows:

I.

That the plaintiff, Edward J. Donovan, was a resident of the State of New Jersey at the time he filed his complaint herein.

II.

That the defendants, David C. Jeffcott and Elsie Jeffcott, his wife, were both residents of the State of Arizona at the time of the filing of such complaint.

III.

That the matter in controversy in such action, exclusive of [45] interest and costs, exceeds the sum of Three Thousand Dollars.

IV.

That, for a long time prior to and including the 31st day of March, 1939, said plaintiff had been engaged, at the City and State of New York, in professional practice as a physician and surgeon, giving specialized attention to surgical conditions of infancy and childhood.

V.

That, on or about the 31st day of March, 1939, Robert Jeffcott, the infant son of said defendants, then being about seven days old, was diagnosed by his attending physicians, at Tucson, Arizona, as suffering from a complete intestinal obstruction.

VI.

That, on or about such 31st day of March, 1939, the said attending physicians of such infant decided that a surgeon having specialized and outstanding training, experience and skill, in performance of the operation for correction of intestinal obstruction in the newborn, should be employed by defendants to operate upon the said Robert Jeffcott.

VII.

That such attending physicians, then and thereupon, suggested to defendants that they employ plaintiff to perform such operation upon such infant son of defendants.

VIII.

That defendants, thereupon and on or about such 31st day of March, 1939, instructed Dr. Hugh C. Thompson, one of such attending physicians of such infant, to act on their behalf in employing plaintiff to perform such operation upon their said son.

IX.

That the said Hugh C. Thompson, then and pursuant to such instructions, arranged that plaintiff would perform such operation upon such infant at Babies Hospital in New York City on the 1st day

[46]

of April, 1939, it being contemplated and arranged that such infant, accompanied by necessary medical and nursing attendants, should be flown to New York City by airplane.

X.

That, shortly thereafter and on said 31st day of March, 1939, the said defendants advised the said Hugh C. Thompson that they desired and were instructing him to make further employment arrangements with plaintiff, under which plaintiff should fly forthwith to Tucson, Arizona, in order to perform such operation there, instead of at New York City; and that defendants did then advise the said

Thompson that money was no object to them in the matter of arranging and making such employment of plaintiff.

XI.

That the said Hugh C. Thompson, pursuant to such instructions and on said 31st day of March, 1939, did negotiate with plaintiff the second time, relative to his employment by defendants, did advise him that defendants desired that he fly forthwith to Tucson, Arizona, to perform such operation, and, in connection therewith, did advise plaintiff that defendants had stated that money was no object.

XII.

That plaintiff thereupon accepted such employment by defendants and agreed to proceed to Tucson, Arizona, by airplane, and to operate upon such infant at Desert Sanatorium, Tucson, Arizona, where such infant was then hospitalized.

XIII.

That such defendants desired and negotiated such change in the employment of plaintiff because they felt that plaintiff's coming to Tucson, Arizona, to there perform such operation, would disturb the orderly routine of fewer people.

XIV.

That, pursuant to such employment and on said 31st day of [47] March, 1939, plaintiff departed from State of New Jersey by airplane and arrived at Tucson, Arizona, during the forenoon of Sunday, the 1st day of April, 1939.

XV.

That, after arriving at Tucson, Arizona, and on said 1st day of April, 1939, plaintiff examined such infant and the available X-rays, held consultations with the attending physicians of such infant and performed an abdominal operation upon such infant for the correction of intestinal obstruction.

XVI.

That, in the course of performing such operation, plaintiff did find and diagnose that such infant was suffering from congenital malformation of the intestinal tract and from malrotation of the small intestine, resulting in complete obstruction.

XVII.

That, in the course of performing such operation, plaintiff did correct such condition of malformation, malrotation and obstruction by bringing the cecum of such infant down to its normal position, by cutting away a band on the ileum of such infant, by untwisting the volvulus and turning all of the small intestine of such infant about two and one-half turns in a counter-clockwise direction, by attaching the cecum of such infant to the parietal peritoneum in the right lower quadrant of the abdomen, where it belonged, and by closing the abdomen in layers.

XVIII.

That, upon completion of such operation, plaintiff caused such infant to be immediately transfused and

then to be given a continuing infusion of glucose and saline until infusion was no longer needed.

XIX.

That plaintiff thereafter remained at Tucson, Arizona, in continued attendance upon such infant, for approximately twenty-four hours and until it had become apparent to plaintiff that such [48] infant no longer required his specialized surgical care.

XX.

That plaintiff then returned to New Jersey by airplane and arrived at his New York office during the afternoon of April 3rd, 1939.

XXI.

That plaintiff thereafter communicated with and extended advice to said Hugh C. Thompson, one of the attending physicians of such infant, in the course of post-operative care.

XXII.

That such operation was successful in correcting such obstruction, in that such infant survived such operation with apparent normal functioning of the intestinal tract.

XXIII.

That such operation was successful in correcting such congenital malformation, in that an X-ray of the intestinal tract of such infant, made on October 1, 1939, indicated that the cecum and colon of such infant were then in normal position.

XXIV.

That the matter of the amount to be charged by plaintiff for his professional services in performing such operation was not discussed by plaintiff and the said Hugh C. Thompson in the course of said negotiations for the employment of plaintiff.

XXV.

That the amount to be charged by plaintiff for such professional services was not discussed by plaintiff and defendants at any time prior to rendition of statement, by plaintiff to defendants, on or about May 1, 1939.

XXVI.

That the condition of such infant, prior to such operation, was very critical, in that is necessitated the performance upon such infant, at a very tender age, of an extremely difficult, delicate and dangerous surgical operation. [49]

XXVII.

That said plaintiff, prior to said 1st day of April, 1939, had had special and extensive training and experience in caring for surgical conditions of infancy and childhood, had had an unusual and outstanding degree of experience in performing the operation, upon newborns and infants, for correction of complete intestinal obstruction, and had attained some national recognition and prominence in such field of pediatric surgery.

XXVIII.

That one or both of the parents of defendant David C. Jeffcott made a gift to such defendant, during 1935, amounting to approximately Seventy-five Thousand Dollars (\$75,000.00);

That defendants used a substantial portion of such gift, during 1936 and 1937, for the purchase of a cattle ranch, located in southern Arizona, paying approximately Fifty Thousand Dollars (\$50,000.00) for such ranch without cattle;

That one or both of the said parents promised to assist the said David C. Jeffcott financially in getting started in the cattle ranching business;

That, making use of such financial assistance and during 1937, defendants began a program of improving, stocking and developing such ranch, including purchases of cattle, made during 1937 and 1938, amounting to about Forty-four Thousand Dollars (\$44,000.00);

That, at the time of the employment of plaintiff and at the time of the performing of the said operation, defendants were the owners of and were operating such cattle ranch;

That such ranch, at or about the time of employment of said plaintiff by said defendants, was worth approximately One Hundred Fifty Thousand Dollars (\$150,000.00), and was subject to an indebtedness of about Seventy Thousand Dollars (\$70,000.00); in favor of one or both of the said parents of David C. Jeffcott;

That a mortgage, to secure payment of such in-

debtedness, was [50] given by defendants to David C. Jeffcott's mother during August, 1939;

That the operation of such ranch did not produce net income for the years 1937 to 1941, both included; but

That during such years the defendants expended approximately Forty-four Thousand Dollars (\$44,000.00) for the purchase of cattle, expended approximately Eighty-three Thousand Dollars (\$83,000.00) for ranch expense, off-set to a substantial degree by sales of cattle and increases in cattle inventories, and expended in excess of Forty Thousand Dollars (\$40,000.00), designated by them as personal expenditures, off-set by dividend income of approximately Six Hundred Fifty Dollars (\$650.00); and

That, on or about the 2nd day of February, 1942, the said ranch of defendants was worth approximately One Hundred Ninety-nine Thousand Nine Hundred Dollars (\$199,900.00), and the mortgage indebtedness, in favor of said David C. Jeffcott's mother, had increased to the sum of approximately One Hundred Twenty-eight Thousand Dollars (\$128,000.00), such mortgage securing payment of the advances made to the said David C. Jeffcott by his said parents during such period of time and the accumulated interest thereon; and

That such defendants anticipated, on or about February 2nd, 1942, that the operation of such ranch, beginning with the year 1942, would produce a net income of between Five Thousand Dollars (\$5,000.00) and Eight Thousand Dollars (\$8,000.00).

XXIX.

That the plaintiff's gross earnings during 1939 amounted to Forty Thousand Eight Hundred Eighty-seven and 05/100 Dollars (\$40,887.05), which said earnings including the sum of Two Thousand Five Hundred Dollars (\$2,500.00) paid by the defendants herein. [51]

XXX.

That the plaintiff had performed eighteen operations of the nature of that performed upon the Jeffcott baby and for which he had received the following compensation: fourteen no charge; one Two Hundred Fifty Dollars (\$250.00); one Three Hundred Fifty Dollars (\$350.00); one One Thousand Dollars (\$1,000.00); one Two Thousand Five Hundred Dollars (\$2,500.00).

XXXI.

That the reasonable value of the said professional services of plaintiff, in performing such operation upon the infant son of such defendants under such circumstances, amounts to the sum of Seven Thousand Five Hundred Dollars (\$7,500.00).

XXXII.

That defendants have paid to plaintiff, on account of such professional services, the sum of Two Thousand Five Hundred Dollars (\$2,500.00).

Wherefore, the court does state separately its conclusions of law thereon, as follows:

1.

That the said court had and has proper and lawful jurisdiction of such cause.

2.

That the said Hugh C. Thompson was acting as the lawful agent for and on behalf of said defendants, and within the scope of his agency, in negotiating for and arranging the employment of plaintiff to operate upon the infant son of defendants at Tucson, Arizona, for the correction of intestinal obstruction.

3.

That the amount to be charged by plaintiff, for his professional services in performing such operation, was not determined by any contract between plaintiff and defendants. [52]

4.

That defendants, by virtue of such employment of plaintiff and by virtue of plaintiff performing such operation upon the infant son of defendants, became jointly and severally indebted to plaintiff in the amount of the reasonable value of the professional services of plaintiff, in accepting such employment and performing such operation, such reasonable value being in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00); and that defendants have paid to plaintiff the sum of Two Thousand Five Hundred Dollars (\$2,500.00) on account of such indebtedness.

Wherefore the court hereby directs that formal judgment be made and entered in such cause, in favor of plaintiff and against the said defendants and each thereof, for the sum of Five Thousand

Dollars (\$5,000.00), together with interest thereon at the rate of six per cent (6%) per annum from entry of judgment until paid, and for plaintiff's costs herein expended, with like interest.

Made And Entered Herein this 10th day of April, 1942.

ALBERT M. SAMES,

Judge of the District Court of
the United States, for the
District of Arizona.

LESLEY B. ALLEN,

37 N. Church St.,

Tucson, Arizona

Attorney for plaintiff

Copy received April 7, 1942.

LAWRENCE V. ROBERTSON

of counsel for defendants. [53]

[Endorsed]: Filed Apr. 10, 1942. [54]

[Title of District Court and Cause.]

OBJECTIONS TO FINAL FINDINGS OF
FACT AND CONCLUSIONS OF LAW

Come now the above named defendants and object to the proposed final findings of fact, conclusions of law and order for judgment submitted and filed by the above named plaintiff on the 7th day of April, 1942, as follows, to-wit:

I.

Said defendants hereby renew all objections here-

tofore filed to the original proposed findings of fact, conclusions of law and form of judgment which were denied or overruled in part by the above court.

II.

That said defendants specifically object to the finding of fact number XXVIII upon the ground and for the reason that the facts therein stated are contrary to the evidence in the case, that the form of such statement of fact is misleading, erroneously and improperly summarizes the true facts as testified to by the defendants, and indirectly infers an agreement on the part of the parents of the defendant, David C. Jeffcott, and tends to indicate a legally enforceable agreement on the part of such parents to advance money on behalf of the defendants herein.

III.

Said defendants further expressly renew and object to finding of fact number XXXI upon the ground and for the reason that such is not a fact but

[55]

a conclusion and that such conclusion is not a fair and reasonable one based upon a consideration of the services rendered, the time devoted by the plaintiff, a comparison with his annual income, and charges for similar services by the plaintiff, and the financial ability of the defendants to pay.

IV.

Said defendants further expressly object to the conclusion of law number 4 for the reasons and

upon the grounds stated in objections number III above set forth.

V.

Said defendants further object to the order that formal judgment be made and entered in the sum of Five Thousand Dollars (\$5,000.00) for the reasons voiced in objections III and IV above set forth.

Wherefore, said defendants pray that the foregoing objections be sustained, and that the court find that said plaintiff has been paid the reasonable value of the services rendered by him to the defendants, and for such other order in the premises as the court may deem just and proper.

DARNELL, PATTEE &
ROBERTSON

By LAWRENCE V. ROBERTSON
ABBIE Y. HOLESAPPLE,
410 Valley National Building,
Tucson, Arizona.
Attorneys for Defendants.

Copy received this 10th day of April, 1942.

LESLEY B. ALLEN,
Attorney for Plaintiff.

[Endorsed]: Filed Apr. 10, 1942. [56]

In the United States District Court
For the District of Arizona
November 1941 Term At Tucson

Minute Entry of
FRIDAY, APRIL 10, 1942
(Tucson Division)

Honorable Albert M. Sames, United States District Judge, Presiding.

Civ. 54

[Title of Cause.]

The reengrossed form of findings of fact and conclusions of law having been submitted to the Court pursuant to the order therefor heretofore entered,

It Is Ordered that the same be approved and filed herein as the findings of fact and conclusions of law.

[57]

In the United States District Court for the
District of Arizona
November 1941 Term At Tucson

Minute Entry of
MONDAY, APRIL 13, 1942
(Tucson Division)

Honorable Albert M. Sames, United States District Judge, presiding.

Civ. 54

[Title of Cause.]

Form of judgment having been submitted to the Court by the counsel for the palintiff, endorsed "ap-

proved as to form subject to all objections made to findings of fact and conclusions of law'' by counsel for the defendants,

It Is Ordered that said form of judgment be approved and entered as the judgment herein as follows: [58]

In the United States District Court, for the
District of Arizona

Civil Action, File No. 54-Tucson

EDWARD J. DONOVAN,

Plaintiff,

vs.

DAVID C. JEFFCOTT and ELSIE JEFFCOTT,
his wife,

Defendants.

JUDGMENT

The Above Entitled Cause having come on regularly for trial before the above entitled court on the 29th day of January, 1942, on the Amended Complaint of plaintiff and the Answer of defendants, Mr. Lesley B. Allen having appeared for plaintiff and Messrs. Darnell, Pattee and Robertson and Mr. Abbie Y. Holesapple having appeared for defendants; and the said cause having been tried before such court, upon the facts and without a jury, on the 29th, 30th and 31st days of January, 1942, and on the 2nd and 3rd days of February, 1942, the said parties appearing in person and by counsel aforesaid; and

evidence, both oral and documentary having been offered and received on behalf of the said parties; and both sides having rested; and

The Said Court having taken such cause under advisement on said 3rd day of February, 1942, with reserved ruling as to the admission of certain evidence; having subsequently ruled and admitted all of such evidence; having found the facts, specially, as appears from Findings of Facts now on file in such cause; having stated separately its conclusions of law, based upon such facts, as appears from Conclusions of Law, now on file in such cause; and having directed the entry of judgment in such cause, in favor of plaintiff and against the defendants and each thereof, as more particularly appears from the file of such cause, [59]

Now, Therefore, the court being advised in the premises and as to the law, and the court having found the facts specially and having stated its conclusions of law thereon, separately,

It Is Hereby Ordered, Adjudged and Decreed as follows:

I.

That the said palintiff, Edward J. Donovan, do have and recover of and from the defendants, David C. Jeffcott and Elsie Jeffcott, his wife, and from each of such defendants, the sum of five thousand dollars (\$5,000.00), together with interest thereon at the rate of six per cent (6%) per annum from the date of entry of this judgment until fully paid and satisfied; and

II.

That the said plaintiff do have and recover of and from the said defendants and each thereof plaintiff's costs of suit herein expended, in the sum of Two hundred and twenty eight Dollars (\$228.00), together with interest thereon at the rate of six per cent (6%) per annum from dates of entry of this judgment until fully paid and satisfied.

Made and Entered Herein this 13th day of April, 1942.

ALBERT M. SAMES

Judge of United States District Court for District of Arizona.

Copy received March 25, 1942.

DARNELL, PATTEE &
ROBERTSON,

of counsel for defendants oj

Approved as to form subject to all objections made to findings of fact and conclusions of law.

LAWRENCE V. ROBERTSON
of counsel for defendants [60]

[Endorsed]: Judgment entered and filed Apr. 13, 1942. [61]

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

Come now the above named defendants, pursuant to Rule 59-a of Rules and Civil Procedure, and move as follows, to-wit:

(a) That a new trial be granted in the above entitled action to said defendants.

(b) That the court set aside the judgment heretofore entered on the 13th day of April, 1942, and enter judgment herein for the defendants.

(c) That the court set aside the findings of fact and conclusions of law heretofore entered and make amended findings of fact pursuant to the motion and offered amendments thereto which were submitted by said defendants prior to the entry of judgment, and that all objections that were made by said defendants to the findings of fact and conclusions of law as entered by the court be sustained.

(d) That the court modify its judgment which was entered herein by materially reducing the amount of such judgment.

The foregoing motions are predicated upon the following grounds:

1. The judgment is not justified by the evidence, is contrary to such evidence and to the law as grossly excessive.

2. That the court erred in rejecting evidence offered by the defendants.

3. That the court erred in admitting evidence offered [62] by the plaintiff and objected to by the defendants.

Wherefore, said defendants pray that the motions above made in the alternative be granted, and for such other relief in the premises as the court may deem just and proper.

DARNELL, PATTEE &

ROBERTSON

By LAWRENCE V. ROBERTSON

ABBIE Y. HOLESAPPLE

410 Valley National Building,

Tucson, Arizona,

Attorneys for Defendants.

Copy received this 20th day of April, 1942.

LESLEY B. ALLEN

Attorney for Plaintiff B

[Endorsed]: Filed Apr. 20, 1942. [63]

[Title of District Court and Cause.]

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR NEW TRIAL

Rule 59 of the Rules of Civil Procedure provides for the granting of a new trial, opening of the judgment, amendment of findings of fact and conclusions of law, and for the making of new findings and conclusions, and permits the entry of a new judgment.

The defendants' principal ground for the motion made in the alternative is that the court's award to the plaintiff is grossly excessive and unreasonable in view of the evidence offered in the case. The award is entirely out of proportion to the evidence of the plaintiff's annual earnings and his charges

for similar operations. The award is most unreasonable in view of the limited financial ability of the defendants. The court well knows that an equity of Seventy-five Thousand Dollars (\$75,000.00) in a cattle ranch does not constitute substantial worth, and to require the payment of Seventy-five Hundred Dollars (\$7500.00) for an operation and services performed over a sixty-hour period is a most unreasonable assessment to be made against such parties.

The defendants strenuously objected to the admission of any evidence of the financial condition and circumstances of the parents of Mr. Jeffcott. There is no evidence in the case of any legally enforceable agreement on the part of these parents wherein they agreed to pay for the services of Dr. Donovan. In the [64] absence of any such agreement, evidence of their worth is entirely immaterial and unquestionably influenced the court in reaching his decision. The court's own findings show that he considered the fact that the defendants could borrow money from Mr. Jeffcott's parents to be "a source of income". Under no possible theory is this legally tenable. The defendants objected to all of this line of testimony and its admission was prejudicial error.

The defendants also attempted to introduce into evidence on cross-examination of Dr. Donovan, the financial ability of the other persons legally responsible for the payment of the charges made by Dr. Donovan for operations of a similar nature on other

occasions. The court sustained the objection of plaintiff's counsel and would not permit cross-examination on this subject. We feel the court's ruling was extremely prejudicial.

The court admitted the testimony of Drs. Burdick, Downs and Beekman and permitted them to express an opinion as to the value of the services of Dr. Donovan where the hypothetical questions propounded to them contained no facts showing, nor tending to show the financial ability of the defendants to pay, notwithstanding the admission of each of these parties that the financial ability of the patient to pay was one of the most important considerations in fixing a fee. Their conclusions, given in response to a hypothetical question which omitted an admitted essential fact could be of no such assistance to the court and was prejudicial to the defendants.

The court erred in adopting Findings of Facts No. XXVIII as the findings therein contained are contrary to the evidence, misleading, erroneously and improperly summarizes facts, and contains evidence and inferences relating to the financial assistance offered by Mr. Jeffcott's parents. This whole finding shows an attitude on the part of the court reflecting a [65] consideration of the financial ability of the parents in determining a reasonable charge to be made. Whether these parents were as rich as Croesus or were on W.P.A. relief, was of no consequence in establishing a reasonable charge for services rendered at the instance and request

of the defendants. The fact that Mr. Jeffcott borrowed money from them should be given no more consideration or import than had he borrowed the money from a banking institution. All moneys borrowed were evidenced by notes and secured by a mortgage in a bona fide businesslike manner.

The court's award is entirely unreasonable inasmuch as it constitutes approximately one-third of the plaintiff's annual income, and the evidence shows that he devoted only sixty hours out of that year, plus a few telephone calls, to the case. The award also represents one-tenth of the defendants' net worth and over one years net annual income. It is hard to say in what way the defendants' financial condition was considered by the court.

For the foregoing reasons, we submit that the court should either grant a new trial, enter judgment for the defendants, or at least substantially modify the amount of the award.

Respectfully submitted,

DARNELL, PATTEE &
ROBERTSON

By LAWRENCE V. ROBERTSON
ABBIE Y. HOLESAPPLE

410 Valley National Building,
Tucson, Arizona,

Attorneys for Defendants [66]

Copy received this 20th day of April, 1942.

LESLEY B. ALLEN B

Attorney for Plaintiff.

[Endorsed]: Filed Apr. 20, 1942. [67]

In the United States District Court for the
District of Arizona

May 1942 Term

At Tucson

Minute Entry of
MONDAY, MAY 4, 1942
(Tucson Division)

Honorable Albert M. Sames, United States District Judge, presiding.

Civ. 54

[Title of Cause.]

It Is Ordered that the defendants' motion for a new trial, heretofore submitted, be denied. [68]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated between the undersigned, attorneys for the respective parties herein, that the amended complaint which was filed in this cause on the 28th day of January, 1942, was duly and regularly filed, and that an order may be entered by this court permitting the filing of said complaint and permitting the answer of the defendants herein to the original complaint to stand as against said amended complaint; and

It Is Further Stipulated that the trial of said cause was upon the issues as framed by said amended complaint and the defendants' answer to the original complaint; and

It Is Further Stipulated that upon the giving of a notice of appeal herein that said defendants may file a cash bond with the clerk of this court in the sum of Five Thousand Two Hundred Fifty Dollars (\$5,2500.00), which shall be as a supersedeas and cost bond and secure the payment of the principal amount of the judgment, interest thereon and costs if the appeal is dismissed or the judgment affirmed or of such judgment principal and costs as the appellate court may award if the judgment is modified.

Dated this 29th day of June, 1942.

LESLEY B. ALLEN

Attorney for Plaintiff

DARNELL, PATTEE &

ROBERTSON

By LAWRENCE V. ROBERTSON

Attorneys for Defendants [69]

Copy received this 29th day of June, 1942.

LESLEY B. ALLEN

Attorney for Plaintiff.

[Endorsed]: Filed Jul. 8, 1942. [70]

In the United States District Court for the
District of Arizona
May 1942 Term At Tucson

Minute Entry of
WEDNESDAY, JULY 8, 1942
(Tucson Division)

Honorable Albert M. Sames, United States District Judge, presiding.

Civ. 54

[Title of Cause.]

Lawrence V. Robertson, Esquire, is present on behalf of the defendants. No appearance is made by or on behalf of the palintiff. Whereupon,

It Is Ordered that the stipulation today filed in these proceedings and now presented by said counsel for the defendants be and it is approved.

It Is Further Ordered that the amended complaint herein filed on the 28th day of January, 1942 be and it is filed, and that the answer of the defendants to the original complaint stand as against said amended complaint. [71]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Edward J. Donovan, Plaintiff, and Leslie B. Allen, Attorney for Plaintiff.

Notice Is Hereby Given that David C. Jeffcott and Elsie Jeffcott, his wife, defendants above named, hereby appeal to the Circuit Court of Appeals for

the Ninth Circuit from the findings of fact, conclusions of law, and the judgment entered thereon entered in this action on the 13th day of April, 1942.

Dated this 8th day of July, 1942.

DARNELL, PATTEE &
ROBERTSON

By LAWRENCE V. ROBERTSON

A Member of the Firm
410 Valley National Building,
Tucson, Arizona
Attorneys for David C. Jeffcott and Elsie Jeffcott, his wife, Defendants.

[Endorsed]: Filed Jul. 8, 1942. [72]

[Title of District Court and Cause.]

STIPULATION

Whereas, during the trial of the above cause, upon suggestion of the court and agreement of counsel, the reading of the depositions of Doctors William A. Downes and Carl G. Burdick and Fenwick Beekman was suspended after question No. 76 of the deposition of Doctor Downes had been asked and answered, it being agreed that the court would read the remainder of the depositions of said witnesses considering objections that had been interposed at the time of the taking of said depositions and would consider all objections that had been interposed during the reading of the portion of the deposition

of Doctor Downes as being applicable to similar questions and subject matters contained in the subsequent portion of said depositions and would permit counsel to submit additional objections to the admissibility, relevancy or materiality of the subject matter of said depositions; and

Whereas, it is necessary for the portion of said depositions which was not read during the trial to be incorporated in the reporter's transcript of testimony;

Now, Therefore,

It Is Agreed that the court reporter shall insert the balance of the testimony and objections contained in the three depositions above mentioned into the transcript of testimony [73] commencing on page 265 of said transcript and continuing thereafter throughout said depositions. The court reporter shall then continue with the transcript of testimony in its regular order.

It Is Hereby Stipulated and Agreed that said testimony shall be considered as though the same had been read during the trial of said action and that all objections made by the attorney for the defendants to the portion of the depositions which was read shall be considered as having been made as to the remaining portions of said depositions in so far as said portions may be applicable and that the trial court's ruling thereon would have been the same. Said testimony shall also be subject to all objections actually made during the taking of said depositions.

It Is Further Stipulated that this stipulation shall

be incorporated in the abstract of record on appeal in this cause.

Dated this 9th day of July, 1942.

LESLEY B. ALLEN

Attorney for Plaintiff

DARNELL, PATTEE &

ROBERTSON

By LAWRENCE V. ROBERTSON

410 Valley National Building,

Tucson, Arizona

Attorneys for David C. Jeffcott and Elsie Jeffcott, his wife, Defendants.

Copy received this 9th day of July, 1942.

LESLEY B. ALLEN

Attorney for Plaintiff

[Endorsed]: Filed Jul. 21, 1942. [74]

In the United States District Court for the
District of Arizona

May 1942 Term

At Tucson

Minute Entry of
SATURDAY, JULY 25, 1942
(Tucson Division)

Honorable Albert M. Sames, United States District Judge, presiding.

Civ. 54

[Title of Cause.]

It Is Ordered that the stipulation, filed herein July 21, 1942, to incorporate depositions into the reporter's transcript be and it is approved. [75]

[Title of District Court and Cause.]

ORDER EXTENDING TIME FOR FILING
ABSTRACT OF RECORD

Upon motion being made by the attorneys for the above named defendants, and just cause being shown,

It Is Hereby Ordered, Adjudged and Decreed that the time within which the clerk of this court is to file the abstract of record in this matter with the clerk of the Circuit Court of Appeals of the Ninth Circuit shall be, and is hereby, extended for a period of thirty (30) days from and after the 17th day of August, 1942.

Done in Open Court this 3rd day of August, 1942.

ALBERT M. SAMES

Judge

Copy rec'd Aug. 3, 1942.

LESLEY B. ALLEN

Atty for Pltf B.

[Endorsed]: Filed Aug. 3, 1942. [76]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON
APPEAL

To the Clerk of the United States District Court,
for the District of Arizona:

We hereby respectfully request that the following be incorporated as the record on appeal in the above action and transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit:

1. Plaintiff's amended complaint.
2. Defendants' answer.
3. Notice of Clerk of United States District Court, dated March 23rd, 1942.
4. Findings of fact and conclusions of law.
5. Defendants' request for filing of objections and amendments to findings of fact and for oral argument, dated March 30th, 1942.
6. Defendants' objections to findings of fact and conclusions of law and offered amended additional findings of fact.
7. Final findings of fact, conclusions of law and order directing judgment.
8. Defendants' objections to final findings of fact and conclusions of law.
9. Judgment.
10. Motion for new trial.
11. Memorandum of points and authorities in support of [77] motion for new trial.
12. Notice of appeal.
13. Stipulation for order permitting filing of

amended complaint and permitting defendants' answer to original complaint to stand as to amended complaint, and for order approving cash bond in the sum of \$5,250.00.

14. Stipulation as to depositions of Drs. William A. Downs, Carl B. Burdick and Penwick Beekman filed July 21st, 1942.

15. The following minute orders of the court:

(a) Order entered March 23rd, 1942, overruling all objections to expert testimony.

(b) Order entered April 6th, 1942, sustaining objections to findings of fact and conclusions of law and ordering revision and additional findings of fact.

(c) Order entered April 10th, 1942, approving reingrossed findings of fact.

(d) Order entered April 13th, 1942, approving judgment.

(e) Order entered May 4th, 1942, denying defendants' motion for new trial.

(f) Order entered July 8th, 1942, approving stipulation as to filing amended complaint and approving cash bond.

(g) Order entered July 23rd, 1942, approving stipulation as to depositions of Drs. Downs, Burdick and Beekman.

(h) Order entered August 3rd, 1942, extending time for filing abstract of record on appeal.

16. Reporter's transcript of testimony.

17. All exhibits, except plaintiff's Exhibit No. 6.

18. Stipulation re plaintiff's Exhibit No. 6.

19. Designation of portions of record. [78]
20. Statement of points relied upon on appeal.

DARNELL & ROBERTSON

By LAWRENCE V. ROBERTSON

A Member of the Firm

410 Valley National Building,

Tucson, Arizona

Attorneys for Defendants.

Copy recieved this 19th day of August, 1942.

LESLEY B. ALLEN

Attorney for Plaintiff

[Endorsed]: Filed Aug. 19, 1942. [79]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON APPEAL

The defendants rely upon the following points as the basis of their appeal to the Circuit Court of Appeals of the Ninth Circuit.

I.

The court erred in its finding of fact No. XXVIII in that it infers a legal obligation on the part of the parents of the defendant, David C. Jeffcott, to advance money and to pay for the services rendered by the plaintiff, which finding is not supported by the evidence and is in conflict therewith. That said finding is also erroneous and misleading in that it sets out in a lump sum the receipts and disbursements over a period of approximately five years which does not show the true financial condition of the parties on the date when the services were

rendered by the plaintiff. Said finding is also erroneous and misleading in that it sets forth a lump sum of personal expenditures without indicating that a portion of said expenditures was for initial ranch expense and also over Six Thousand Dollars (\$6,000.00) for expenses incurred in connection with the illness of the minor son who was operated on by the plaintiff, and said sum also includes Two Thousand Five Hundred Dollars (\$2,500.00) which was paid to the plaintiff. [80]

II.

The court erred in its finding of fact No. XXXI in that the determination of a reasonable fee in the sum of Seven Thousand Five Hundred Dollars (\$7,500.00) was contrary to law and the evidence adduced at the trial, was excessive and unreasonable for the following reasons:

(a) That the fee was disproportionate to other fees charged and collected for similar services performed by the plaintiff.

(b) That the fee was disproportionate to the annual income of the plaintiff and represents an excessive charge for the services rendered.

(c) That the fee is excessive and unreasonable in view of the financial ability of the defendants to pay.

(d) That the fee was determined upon an assumption by the court that the defendants' parents were financially obligated to pay said fee.

III.

The court erred in its conclusion of law No.

4 in that the court's conclusion that the sum of Seventy-five Hundred Dollars (\$7,500.00) was a reasonable fee for plaintiff's services, was erroneous in that such conclusion was contrary to the law and the evidence adduced at the trial of said cause, was excessive and unreasonable for the reasons stated above in support of point No. II.

IV.

That the judgment of the court made and entered on the 11th day of April, 1942, was not sustained by the law or the evidence adduced at the trial of said cause, was unreasonable and excessive for the reasons stated in support of points No. II and III herein.

V.

That the court erred in permitting Drs. William A. Downs, Carl G. Burdick and Fenwick Beekman to testify, through deposition, [81] as witnesses on behalf of the plaintiff and to express an opinion as to the reasonable value of the services performed by said plaintiff in that the hypothetical questions which were propounded to each of said experts did not assume or contain any facts of or reference to the financial condition of the defendants or their ability to pay for professional services.

VI.

The court erred in admitting evidence of the financial ability of the parents of the defendant, David C. Jeffcott, who were in no way obligated to pay for the professional services rendered to

the defendants, which said evidence was highly prejudicial to the defendants.

VII.

The court erred in denying the defendants' motion for new trial, and in refusing to modify or mitigate the award made the plaintiff herein for the reasons stated in support of points Nos. II, III and IV herein.

Respectfully submitted,

DARNELL & ROBERTSON,

By LAWRENCE V. ROBERTSON,

A Member of the Firm,

410 Valley National Building,

Tucson, Arizona,

Attorneys for Defendants.

Copy received this 19th day of Aug., 1942.

LESLEY B. ALLEN,

Attorney for Plaintiff.

[Endorsed]: Filed Aug. 19, 1942. [82]

In the United States District Court
for the District of Arizona

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL**

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the

records, papers and files in the case of Edward J. Donovan, Plaintiff, versus, David C. Jeffcott and Elsie Jeffcott, his wife, Defendants, numbered Civil 54-Tucson, on the docket of said Court.

I further certify that the attached pages numbered 1 to 82, inclusive, together with the duplicate original of the reporter's transcript duly certified by said reporter transmitted herewith, contain a full, true and correct transcript of the proceedings of said cause and all papers filed therein, together with the endorsements of filing thereon, called for in appellants' designation of the portions of the record, proceedings and evidence to be contained in the record on appeal from the judgment entered April 13, 1942 in the above-entitled cause as the same appear from the originals of record and on file in my office as such Clerk, in the City of Tucson, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of \$17.35 and that said sum has been paid to me by counsel for the appellants.

Witness my hand and the seal of said Court this 8th day of September, 1942.

[Seal]

EDWARD W. SCRUGGS,
Clerk. [83]

[Title of District Court and Cause.]

TESTIMONY

Appearances:

For the plaintiff,

Lesley B. Allen, Esquire,
37 North Church Street,
Tucson, Arizona.

For the defendants,

Messrs. Darnell & Robertson,
Valley National Building,
Tucson, Arizona.

The United States District Court, for the District of Arizona, convened at ten o'clock in the forenoon, January 29, 1942, with the Honorable Albert M. Sames, judge of said court, presiding, and the other regular officers of the court present.

The plaintiff appeared in person and by his attorney, Lesley B. Allen, Esquire; and the defendants were present in person and were represented by counsel, Messrs. Darnell and Robertson.

Lenna H. Burges was sworn to report the trial in shorthand and transcribe her shorthand notes, if requested to do so, to the best of her skill and ability.

Thereupon, and all parties announcing themselves ready, the trial proceeded as follows:

Mr. Allen: Does the court require the reading of the complaint?

The Court: I think not. Was there an amended complaint?

Mr. Allen: An amended complaint was filed with consent of counsel yesterday, but the only amendment was changing and correcting a typographical error as to the plaintiff. I call Mr. Jeffcott for cross-examination under the rule.

DAVID C. JEFFCOTT,

one of the defendants herein, having been first duly sworn, according to law, to testify to the truth, the whole truth and nothing but the truth, was cross-examined under the rule and testified as follows:

Cross Examination

By Mr. Allen:

Q. Your name is David C. Jeffcott?

A. Yes, sir.

Q. And you, with your wife, Elsie Jeffcott, are defendants in this action brought by Dr. Edward J. Donovan. Is that correct? A. Yes, sir.

Q. And what is the full name of your son who was operated [2*] on by Dr. Donovan?

A. Robert Crawford Jeffcott, II.

Q. Robert Crawford Jeffcott. When was your son, Robert Crawford Jeffcott, born?

A. I believe it was eight days before Dr. Donovan operated on the child.

*Page numbering appearing at top of page of original Reporter's Transcript.

(Testimony of David C. Jeffcott.)

Q. He operated on the child on or about the second day of April, 1939, did he not?

A. Yes, sir, it was on a Sunday morning.

Q. Now who, or what physicians did you have in attendance on your wife or upon your son, Robert, prior to the time that you brought Dr. Donovan on the case?

A. Dr. Carrell delivered my baby, our baby, and Dr. Hugh Thompson, of course, is a member of the Desert Sanatorium staff, and was also in attendance, anyhow from the time it was first seen that the baby was not well. I believe Dr. Thompson and Dr. Carrell then called Dr. Vivian Tappan as consultant.

Q. Now, when did you decide to employ Dr. Donovan with reference to the birth of the child?

A. When it was known that the baby was going to need an operation.

Q. Would that have been on or about somewhere from the fifth to the seventh day of its life?

A. I think that it was either the preceding Thursday or Friday. I think it was Friday.

Q. That it was decided that an operation would be necessary? [3]

A. Yes, sir.

Q. Who advised you that an operation would be necessary?

A. I don't remember who the person was that told us, of the three doctors that were in attendance.

(Testimony of David C. Jeffcott.)

Q. At least one or more of the physicians who were in attendance upon the child at that time told you? A. Yes, sir.

Q. And that may have been Dr. Tappan, as far as you recall at this time?

A. I could not say which doctor it was.

Q. Now, where was the conversation had with reference to the need for an operation?

A. I believe it was at the Desert Sanatorium, sir.

Q. In your wife's room at the Desert Sanatorium, was it?

A. I am not sure that the first I heard of that was in her room.

Q. But it was discussed in the presence of both of you before any decision was reached?

A. That is correct, sir.

Q. Do you remember who suggested the employment of Dr. Donovan?

A. To the best of my knowledge, when it was known that an operation was necessary on the baby, there was some question as to where a doctor could be found who was able to perform that operation. I think it was suggested that possibly we might locate one on the Coast. Dr. Tappan and Dr. Thompson both were acquainted with [4] Dr. Donovan, and I think it was natural that their choice would be Dr. Donovan. Now, whether it was Dr. Tappan

(Testimony of David C. Jeffcott.)

or Dr. Thompson who first suggested Dr. Donovan, I don't just remember.

Q. You don't just remember?

A. Whether it was Dr. Tappan or Dr. Thompson who first suggested Dr. Donovan I do not now remember, though Dr. Thompson was the person who then spent most of the time with us and made the final arrangements.

Q. And he made those arrangements at your suggestion and at your request, did he not?

A. I don't know exactly that you could put it that way, sir. However, it was decided that we had to employ a doctor and inasmuch as Dr. Donovan was the man that Dr. Tappan and Dr. Thompson thought was the best man, we had no choice except to follow their suggestion.

Q. And you authorized and directed one or both of them to make the necessary arrangements, did you not?

A. Yes, sir. We were not acquainted with Dr. Donovan.

Q. You did not call Dr. Donovan yourself?

A. No, sir, I did not.

Q. You had one of those doctors do it?

A. One of the doctors offered to do it.

Q. And you accepted that offer?

A. Yes, sir.

Q. That doctor was Dr. Hugh Thompson, was it not, that [5] finally called Dr. Donovan?

A. Yes, sir.

(Testimony of David C. Jeffcott.)

Q. He first called Dr. Donovan by long distance and made arrangements that the baby, attended by a physician and the necessary nursing staff, be taken to New York by plane to receive attention from Dr. Donovan at New York, did he not?

A. Yes, sir, I think that is correct.

Q. Then shortly thereafter, during that same day, and having discussed the matter with your wife and with others, you proposed to him, did you not, that he again get in touch with Dr. Donovan concerning the matter?

Mr. Robertson: If the court please, I object to that question, because it encompasses too many facts. Mr. Allen starts out and gives a long narrative of various things that happened without giving the witness an opportunity to answer to each one.

The Court: You make an objection the compound question?

Mr. Robertson: Yes, a compound question, to which it would be impossible to give a simple, intelligent answer.

Mr. Allen: I believe it is subject to an answer. I believe the [6] witness understands the question readily.

The Court: Mrs. Reporter, read the question.

The Reporter: (Reading)

Q. Then shortly thereafter, during that same day, and having discussed the matter with your wife and with others, you proposed to him, did you not, that he again get in touch with Dr. Donovan concerning the matter?

(Testimony of David C. Jeffcott.)

The Court: Answer the question.

A. May I elaborate on that question, or must I answer it "yes" or "no"?

Mr. Allen: I would like the "yes" or "no" answer. A. The answer is yes.

Q. What is your answer?

A. Yes. The answer is yes, sir.

Q. I think your counsel will give you full opportunity to elaborate on it. I will proceed, if I may. The reason that that decision was—I will withdraw that. When you had such second conversation with Dr. Thompson, you requested him then, did you not, to arrange if possible to have Dr. Donovan come here and perform the needed operation at the Desert Sanatorium? [7] A. Yes, sir.

Q. And your reason for that was that you understood and believed that it would be easier and better for the baby if that were done?

A. Yes, sir, that was part of the reason, sir.

Q. What were your other reasons?

A. That it did not seem to us that it would be any more expensive to have the doctor come here than it would be to take the doctor there—excuse me—to take the baby, the doctor and attendants, nurse and necessary paraphernalia to the doctor.

Q. Now, in the course of that conversation with Dr. Thompson, preparatory to his second negotiation with Dr. Donovan, Dr. Thompson asked you if money or expense was any object, did he not?

A. Yes, sir, he did.

(Testimony of David C. Jeffcott.)

Q. And you told him that it was not?

A. I don't think I ever said that. I think what I said in answer to his question was that it would not cost much more to have the doctor come here than to take the doctor and baby and nurse and paraphernalia to New York to Dr. Donovan.

Q. You think that is what you told him?

A. Yes, sir.

Q. You could be mistaken in that respect, I presume?

A. I think I am testifying from the best of my knowledge. The time is several years since then.

[8]

Q. It is quite a while back and you could be mistaken about what you said? A. Yes, sir.

Q. You also told Dr. Thompson, as a part of that conversation relative to your instructions to him concerning the second negotiations with Dr. Donovan, did you not, that if he objected to coming here to perform the operation, that you could put pressure on him through Dr. Palmer, in New York?

A. I never remember making such a statement.

Q. You merely say you do not remember such a statement?

A. I might add that I do not think I am in the habit of doing that sort of thing.

Q. And still your answer is you do not remember making such a statement?

A. Yes, sir, one either remembers or one does not remember.

(Testimony of David C. Jeffcott.)

Q. And you do not remember such a statement?

A. I do not remember such a statement.

Q. Now, you know it to be a fact, do you not, Mr. Jeffcott, that Dr. Thompson, following your request and your instructions as to that second conversation, did have such a conversation with Dr. Donovan, and did make arrangements on your behalf for him to come here and operate at the Desert Sanatorium?

A. Following Dr. Thompson's conversation with Dr. Donovan, he called me back at the point where I was and told me that Dr. Donovan would come and would arrive in Tucson [9] at such and such a time.

Q. And that time was early the next forenoon?

A. Yes, sir.

Q. And Dr. Donovan did arrive early the next forenoon?

A. That was Sunday morning, yes, sir.

Q. And these negotiations were had with him beginning about noon of the preceding day, Saturday?

A. Yes, sir, I think shortly before noon.

Q. And the last conversation or negotiation was slightly after noon?

A. Yes, sir, I believe there may have been an hour's time between the first and second conversations.

Q. And following Dr. Donovan's arrival in Tucson and shortly thereafter, he went into consultation with the local physicians who were attending your son, did he not?

(Testimony of David C. Jeffcott.)

A. I am not too well acquainted with Dr. Donovan's methods after he arrived in Tucson, sir. I asked Dr. Thompson if it would be all right for me to go and meet Dr. Donovan, and he said no, it would be much better that I did not.

Q. You did not meet him and do not know what he did? A. No.

Q. You do know, however, that relatively soon after his arrival, he performed an operation on your son, Robert?

A. Yes, sir, I think between ten and eleven o'clock.

Q. And that operation was for the correction of a complete obstruction of the intestine, was it not?

[10]

Mr. Robertson: I suggest the witness be informed that unless he knows these facts he not answer.

Mr. Allen: I think he is doing very well.

Mr. Robertson: I think he is doing very well, but I think he should be informed that unless he knows, he should not attempt to answer.

Mr. Allen: I believe the counsel should have explained those things to Mr. Jeffcott, and I don't think any remonstrance is due from the counsel or the bench. I object to the counsel attempting to remonstrate.

Mr. Robertson: I object to these continued insinuations by Mr. Allen. I ask Your Honor to instruct the witness that unless he knows——

The Court: Well, answer the question so far as the answer is possible within your knowledge.

(Testimony of David C. Jeffcott.)

The Witness: May I ask for a reading of the question? [11]

The Reporter: (Reading)

Q. And that operation was for the correction of a complete obstruction of the intestine, was it not?

A. I cannot answer that question completely because from the time I knew or heard there was something the matter with the child, so many doctors have called it by so many different terms, that I am not really clear in my mind today of what it involves. As I understood the operation, as told to me in layman's language by a doctor, consisted in going in and removing all of the intestines, laying them on the chest of the child, unwinding them and putting them back in the child in proper position. If that involves, because of the shape the intestines were in, a knot, so to speak, I can understand it. An obstruction to me means a clot of dirt or something in a pipe which would not permit any material to pass through.

Q. You understood no fetid material passed through the intestines of your son prior to that operation?

A. Yes, sir, I think that is correct.

Q. You also understood and regarded the condition of your infant son on Saturday and Sunday, the day that operation was ultimately performed, was very grave indeed, did you not?

A. The three doctors differed in their manner of telling us how grave the situation was.

(Testimony of David C. Jeffcott.)

Q. How did you view the situation, is what I am asking you, Mr. Jeffcott? [12]

A. I should have said that I think three days before the baby looked far worse to me than the day he was operated.

Q. But you still thought his condition was very serious? A. I understood it was serious.

Q. And that is the reason you did not want any local surgeon to attempt the performance of the operation?

A. That is not correct, sir. When you are in a sanatorium or in a hospital or any place like that, and you are not very well acquainted with medicine, you must rely on the doctor's advice, and the several doctor's advice was we should get somebody who specialized in that work.

Q. That is the point exactly. You felt on their advice there was no surgeon available in this locality who had specialized and had particular training in that particular line of surgery?

A. Yes, sir.

Q. And for that reason, because you believed a specialist was necessary, you ultimately employed Dr. Donovan to perform the operation?

A. I was forced to believe it.

Q. You did believe it, did you not?

A. At that time I did.

Q. You did employ Dr. Donovan to perform the operation?

A. At the suggestion of my doctors, yes.

(Testimony of David C. Jeffcott.)

Q. And because you did believe a specialist was essential. That is right, isn't it?

A. As the doctors informed me, yes, sir. [13]

Q. Your son survived this operation, did he not?

A. Yes, sir.

Q. Now, Mr. Jeffcott, did you have any conversation whatever with Dr. Donovan while he was here, with reference to the matter of a fee?

A. No, sir.

Q. You never made any move whatever at any time prior to this operation to bring about an opportunity to discuss a fee with him, did you?

A. I believe that, as you mentioned, sir, the time between Dr. Donovan's arrival and the operation was very short, and naturally I would not have that opportunity.

Q. I understand that, but I still ask you, did you at any time, either before Dr. Donovan performed the operation or during his stay at Tucson, make any effort toward negotiating with him relative to the amount of a fee?

A. I can answer that question, yes, sir.

Q. What is your answer?

A. After the operation, I stayed outside the operating room between thirty and forty-five minutes, while Dr. Donovan sat in a room adjoining the operating room talking to the doctors, I assume about what he had done.

Q. Did you indicate to Dr. Donovan a desire to talk to him?

(Testimony of David C. Jeffcott.)

A. Sir, in my position—Let me change that. I was brought up that my superior was to speak to me first.

Q. You regarded you were inferior to Dr. Donovan?

A. I think in a case like that, yes, sir. [14]

Q. Did you ask Dr. Thompson, instruct him in the course of his negotiations on your behalf, to ascertain what the fee would be, what the charge would be?

A. No, sir, I did not. The time was very short.

Q. The fact of the matter is you did not even go so far as to ask Dr. Donovan whether he needed any money to fly to Tucson and perform the operation?

A. The suggestion was made to Dr. Thompson, I believe it was, that I would be very glad to get Dr. Donovan's tickets for him, and I asked that question.

Q. I ask the question be repeated and that you answer it.

The Court: Speak louder, Mr. Jeffcott. I have difficulty in hearing you.

The Reporter: (Reading)

Q. The fact of the matter is you did not even go so far as to ask Dr. Donovan whether he needed any money to fly to Tucson and perform the operation?

A. It is difficult for me to answer that question, because in one sense I did. In a sense I asked Dr.

(Testimony of David C. Jeffcott.)

Thompson to convey the information that I would be glad to get Dr. Donovan's tickets for him.

Mr. Allen:

Q. After he arrived here, you made no mention to Dr. Donovan about paying his expense or making any advance on account [15] of his expense, did you?

A. Had I been able to see Dr. Donovan—that is not a clear representation of what I mean. Had Dr. Donovan and I been able to get together, because of the circumstances, I most certainly would have said that to him.

Q. Your answer is that if he had come to you, you would have brought the subject up?

A. No, sir, that is not my answer. My understanding was that Dr. Donovan was to take a plane Monday night from Tucson. I had other business and was forced to leave Tucson Sunday evening, to return Monday. I told my wife and the others I would be back Monday noon. To the best of my knowledge, I was back before noon, very shortly after Dr. Donovan was forced to leave at an earlier date. I had planned that afternoon to go into it with Dr. Donovan.

Q. Now, shortly after the operation, you received your statement from Dr. Donovan, did you not?

A. Shortly? I don't remember the date, sir, but I think approximately—I don't remember the day or date, but it was within a month, I think.

Q. Anyhow, he sent you a statement?

(Testimony of David C. Jeffcott.)

A. Yes, sir.

Q. In that statement, he indicated his total charge, including his expenses and his fee, was twelve thousand five hundred dollars, did he not?

[16]

Mr. Robertson: If the court please, I object to the question, because the statement would be the best evidence, and I have it here available and will produce it for counsel, if he wants it. And I might call the court's attention to the fact that the statement does not indicate what Mr. Allen just said.

Mr. Allen: I will withdraw the question.

Q. I ask you to examine this document, Mr. Jeffcott.

A. Yes, sir.

Q. You recognize that, do you not?

A. Yes, sir.

Q. And that document—withdraw that. Do you know anything about this pencil mark on the statement?

A. Yes, sir, that is in my handwriting, and also the ink.

Q. Aside from the pencil and ink marks thereon, this document constitutes a statement rendered to you by Dr. Donovan?

A. Yes, sir.

Mr. Allen: I offer it in evidence.

Mr. Robertson: No objections.

The Court: It may be admitted and marked. [17]

(Statement marked as Plaintiff's Exhibit No.

1.)

(Testimony of David C. Jeffcott.)

[Plaintiff's Exhibit No. 1 is set out at page 8 of this printed record.]

Mr. Allen:

Q. Now, you say you received that statement approximately, or within a month after the operation was performed?

A. Yes, sir, the date of the bill was May first.

Q. And how long did you wait thereafter before communicating to Dr. Donovan, or with Dr. Donovan, in regard to that statement?

A. I do not recall, sir, except it was not immediately.

The Court: What is that, Mr. Witness?

A. I don't recall how long I waited after receiving Dr. Donovan's bill, except I did not answer it immediately.

Mr. Allen:

Q. Was it as much as three or four weeks later-

A. Yes, sir, I think that is conceivable.

Mr. Allen: May I have this marked for identification?

(Letter marked Plaintiff's Exhibit No. 2 for identification.)

Mr. Allen:

Q. Mr. Jeffcott, I hand you plaintiff's Exhibit 2 for identification, and ask you to examine the same and [18] state whether or not you recognize what that document is. A. Yes, sir.

Q. It is a letter which you wrote entirely in your handwriting? A. Yes, sir.

(Testimony of David C. Jeffcott.)

Q. A letter in which you made the first reply to Dr. Donovan relative to that statement?

A. Yes, sir.

Q. And a letter in which you discuss the statement and his charge? A. Yes, sir.

Mr. Robertson: If the court please, the letter speaks for itself.

Mr. Allen: I offer it in evidence as Plaintiff's Exhibit 2.

The Court: Any objection to it, Mr. Robertson?

Mr. Robertson: Just a moment. No objection.

The Court: It is admitted.

(Plaintiff's Exhibit No. 2 for Identification, a letter, admitted and marked Plaintiff's Exhibit 2.)

[Plaintiff's Exhibit No. 2 is set out at page 8 of this printed record.] [19]

Mr. Allen: May I read this letter to the court at this time, or does the court prefer to read it himself?

The Court: If there is any occasion to read it at this time, you may do so.

Mr. Allen: I wish to examine the witness in reference to some of the comments in the letter.

Mr. Robertson: I request that Mr. Allen read the letter to your Honor.

The Court: Go ahead.

(Thereupon Mr. Allen read Plaintiff's Exhibit 2.)

(Testimony of David C. Jeffcott.)

Mr. Allen:

Q. Now, Mr. Jeffcott, there is no doubt in your mind, is there, but that, as stated in this letter, Plaintiff's Exhibit 2, Dr. Donovan did provide a wonderful service for you and your wife in operating successfully upon your son, Robert?

A. Yes, sir.

Q. You do not question that, do you?

A. No, sir. There are no grounds on which I could question it. [20]

Q. Now, in that regard, Mr. Jeffcott, how many children did you have after the birth of Robert?

A. After the birth of Robert, sir, none.

Q. How many children in all do you have?

A. We now have three, sir.

Q. The first two were girls?

A. Correct, sir.

Q. And this is—What is your father's name?

A. My father's name is Robert Crawford Jeffcott.

Q. And this son of yours, Robert Crawford Jeffcott, is your father's first grandson, isn't that correct?

A. Yes, sir.

Q. And your father, Robert Crawford Jeffcott, was extremely interested in that son of yours at the time he was born?

Mr. Robertson: I object to the grandfather——

Mr. Allen: The child was named for him.

Mr. Robertson: I happen to have one named for me, too. The grandfather is not a party to this litigation.

(Testimony of David C. Jeffcott.)

The Court: Unless you make a showing as to the materiality, it is not admissible. [21]

Mr. Allen: It is a foundational question leading up to the consideration of the wealth of the Jeffcott family and the importance of this male son in the light thereof, and there seems to be no question but that the seriousness of the operation is a matter that can be taken into account in determining the cost of an operation, just as it seems to be the better line, and now almost universally recognized line of authority that the financial ability or wealth of the parents themselves or the child may be taken into consideration, not only by the surgeon in determining his fee, but by the jury and court.

The Court: I understand that principle but this seems to be a remote situation, so far as the grandfather is concerned.

Mr. Allen: So far as the responsibility placed upon the surgeon in performing this operation, I think he is entitled to bring out any particular aspect which would place an out-of-the-ordinary responsibility as to the particular infant, and that is the theory on which it is offered. It is offered to show that this particular infant was of outstanding importance and consequently the operation upon him would result in a larger degree the feeling of responsibility upon the surgeon. In other words, it is one of the elements that shows or tends to show the relation between [22] these parties in this employment, and the very nature of the employment.

(Testimony of David C. Jeffcott.)

There is a great difference in operating on one infant and another, so far as the responsibility on that surgeon is concerned, because aside from the fact that every man is deemed to have a high degree of affection for and high degree of interest in his offspring, certainly there can be circumstances which make a particular child of outstanding importance to his parents.

Mr. Robertson: I think this child was just about as important to Mr. and Mrs. David C. Jeffcott as any child ever born, but I do not see how that could make this line of testimony material. It might cast a sentimental reflection upon the lawsuit, to say that the child was named for its grandfather. He is the only male grandchild, and for that reason he may perhaps be worth a little bit more to Mr. and Mrs. Jeffcott, but we are in a court of law now, determining what is a reasonable fee for the operation, and unless the grandparents, uncles or aunts or someone else has some financial responsibility for the payment of this fee of twelve thousand five hundred dollars, what their financial circumstances are is immaterial. It is solely a question of the financial ability of those who are responsible for the payment of the bill, and I join with Mr. Allen in saying that the modern trend of authorities is not only that you may inquire [23] into the financial responsibility of the parents, but also of the doctor who performs the operation, and I renew my objection to the question.

(Testimony of David C. Jeffcott.)

The Court: I shall permit the question to be answered and reserve the ruling as to the admissibility.

The Reporter: (Reading)

Q. And your father, Robert Crawford Jeffcott, was extremely interested in that son of yours at the time he was born?

A. I am not quite clear on my dates, but unless I am mistaken, my father was in New York—pardon me—New Jersey, for some little time before the baby was born and after he was born. I presume he felt the normal reactions of any grandfather.

Mr. Allen:

Q. He communicated to you the hope, did he not, that he was in hopes that this prospective child would be a male child?

Mr. Robertson: The same objection.

The Court: The question may be answered.

A. I do not recall that such a statement was ever made, sir.

Mr. Allen: You knew that such was the case, didn't you? [24]

A. I think most parents realize that most grandfathers wish boys, for some reason. I like girls.

Q. You made it known, stated to these physicians who were in attendance upon your wife and your son at the time of childbirth that such were the conditions?

Mr. Robertson: Moreover, if your Honor please,

(Testimony of David C. Jeffcott.)

any expectations or hopes or fatherly wishes that Mr. Dave Jeffcott may have had, would hardly heap any greater responsibility upon Dr. Donovan. I presume he has the same desire to save the life of any child he operates upon. It seems entirely immaterial.

The Court: The witness may answer the question.

A. I am not quite clear what these conditions are.

Mr. Allen:

Q. You told the physicians of Tucson, Arizona, that were on the case that that child, Robert, was extremely important, because he was the first male grandson, did you not?

A. After or before the child was born, sir?

Q. Did you at either time tell them so, I asked you in connection with the child's birth.

A. If I did, it was no more than I think any parent would [25] have done under the circumstances, had the baby been well or sick.

Q. On May 22, 1939, when you wrote Plaintiff's Exhibit 2 to Dr. Donovan, it is correct that at that time you and your wife owned and were operating a cattle ranch near Patagonia?

A. Yes, sir.

Q. What is the extent of your holdings down there, Mr. Jeffcott?

A. At the present time?

Q. What were they on May 22, 1939?

A. I am sorry, I can only give you a rough idea

(Testimony of David C. Jeffcott.)

of what that was, because I have been adding to it, or trying to, through natural increase born on the ranch. In land, at that time and at the present, I have a forest permit for 477 head of cattle. In addition, I have approximately sixty-five hundred acres of deeded land.

Q. How many cattle did you own at that time?

A. Sir, without reference to my books, I would be unable to answer that question accurately, and I would prefer to answer accurately.

Q. They were all top quality cattle, were they not?

A. No, sir, they were not.

Q. And at that time you regarded that that ranch set-up was worth one hundred and fifty thousand dollars?

A. I think that is correct, yes, sir.

Q. And it is also correct that whatever encumbrance you [26] had against it was in favor of your mother, was it not?

A. No, sir, that is not correct.

Q. In the main, she held whatever mortgages were on that property, did she not?

A. No, sir, she did not.

Q. Does she at the present time?

A. Yes, sir.

Q. At the present time, she holds practically all of the encumbrance against it, does she not?

A. Yes, sir.

Q. And your father and mother made a very substantial investment in that property, in the form of

(Testimony of David C. Jeffcott.)

the erection of extensive and expensive dwellings soon after this operation, did they not?

Mr. Robertson: I object to the question unless Mr. Allen lays the foundation that any improvements made by way of buildings upon the property belonging to Mr. Dave Jeffcott enhances the value of Mr. Dave Jeffcott's holdings.

Mr. Allen:

Q. My question is whether or not he did not build it upon this defendant's property.

A. May I ask that that question be repeated.

The Reporter: (Reading)

Q. And your father and mother made a very substantial in- [27] vestment in that property, in the form of the erection of extensive and expensive dwellings soon after this operation, did they not?

Mr. Allen:

Q. I refer to the property owned by you and Mrs. Jeffcott.

A. The answer is no, sir.

The Court: What is your answer, Mr. Witness?

A. No, sir.

Mr. Allen:

Q. Did you and Elsie Jeffcott deed to them a portion of your holdings and they built upon that portion?

A. Yes, sir.

Q. Now, I want to ask you to state, Mr. Jeffcott, what you have paid to your mother on account of the mortgage which she holds, since she took that mortgage?

A. I am sorry I don't have my books with me

(Testimony of David C. Jeffcott.)

this morning. I did not expect to be called, and I prefer not to answer that question until I look at my books.

Mr. Allen: May I have just one moment, your Honor?

The Court: We might pause for a moment.

Mr. Allen:

Q. Now, have you paid anything to Dr. Donovan on account of [28] his services in the performance of this operation? A. Have I, sir?

Q. Yes.

A. Yes, twenty-five hundred dollars.

Q. Now, to go back a moment, Mr. Jeffcott, to the question of the importance of your son in the Jeffcott family, it is a fact, is it not, that your father, Robert Crawford Jeffcott, is an extremely wealthy man?

Mr. Robertson: I object to that question and object to a question being asked in a court where Mr. Allen very well knows that unless the grandfather of this baby, in some written obligation, has agreed to pay for this operation, he is under no financial responsibility for it, and is certainly not admissible in this lawsuit. He knows that the other doctor, Dr. Hugh Thompson, employed Dr. Donovan. I object to the question and would request the court to instruct counsel that any such line of inquiry is not proper in this action.

Mr. Allen: I again assert that we make no claim against Robert Crawford Jeffcott, senior, or the

(Testimony of David C. Jeffcott.)

mother, but we maintain, as previously outlined to the court, that we have a right to go into the nature of the responsibility of this surgeon with regard to any peculiar or unusual importance that might have been placed by the family upon this particular child, and this question is foundational as to the natural line of inheritance which would be expected to follow in this family. That is the purpose of it.

Mr. Robertson: The very fact it might be the natural line of inheritance unfortunately does not guarantee to Mr. Dave Jeffcott that he will inherit any of such money.

The Court: I suppose the importance to the plaintiff in this case of this testimony is the importance of this child to the parents.

Mr. Robertson: The parents are the only defendants in the action, and we must confine the evidence that is introduced in this case to the parties that are in this case.

The Court: Let the question be answered and the court will reserve the ruling. If this seems to the court remote and should not be considered, the court will disregard it altogether. The question may be answered with the understanding that the ruling is reserved.

The Reporter: (Reading)

Q. Now, to go back a moment, Mr. Jeffcott, to the question of the importance of your son in the Jeffcott family, it [30] is a fact, is it not, that your

(Testimony of David C. Jeffcott.)

father, Robert Crawford Jeffcott, is an extremely wealthy man?

A. I have done quite a lot of work with figures in my life and had I ever seen any figures on my father's wealth or lack of wealth, I would be able to answer that question, but truly I do not know what his wealth consists of. I have never been taken into his confidence, nor to my knowledge has anybody else, as to what he has, has had, or will have, or has now.

Mr. Allen:

Q. Nevertheless, you regard him as a man of very substantial means, do you not?

A. I have lived in the family quite a while and I know it has always been told to me how hard times were, and we have been instructed to be thrifty.

Q. Answer the question. Do you or do you not regard your father as a man of substantial means?

Mr. Robertson: Mr. Allen is adopting the same terms we find in the complaint. He says "a man of substantial means." In the complaint he says "a reasonable fee of twelve thousand five hundred dollars". What is "reasonable"? What is "substantial"? What might be a whale of a lot to someone else might be a "reasonable" fee to another.

The Court: Answer the question. [31]

A. Sir, I find it exceedingly difficult to answer that question, because what does constitute reasonable wealth? If somebody said to me a man has

(Testimony of David C. Jeffcott.)

an annual income of a million dollars a year, I would understand that. I do not know what my father's income is. I know he has had things that have seemed to cost a lot of money, and I have also heard they were mortgaged heavily, and I don't know.

Mr. Allen:

Q. One of the things that seemed to cost a lot of money is a yacht upon which he employed a very extensive crew?

Mr. Robertson: May I have a continuing objection?

A. Yes, sir, I believe you are correct that on the face of it that appeared to be true.

Mr. Allen:

Q. And you would not say that those mansions he built down close to your ranch home are paid for with chicken feed, would you? A. No.

Q. He has a very substantial investment there, for a place to live, has he not?

A. I do not know the cost of that. I could guess, but I do not know.

Q. What would be your guess? [32]

A. Anything from fifty thousand to two hundred thousand.

Q. And now it was your father, Robert Crawford Jeffcott that you contemplated having engage his physician, Dr. Palmer, to put the pressure on Dr. Donovan, if he objected to coming to Tucson?

Mr. Robertson: Object to the question. The wit-

(Testimony of David C. Jeffcott.)

ness has stated that he made no such statement, and that it is against his principles to do such a thing.

Mr. Allen:

Q. I qualify my question that if he made such a request, he is bound to have contemplated that his father, through Dr. Palmer, would put the pressure on.

Mr. Robertson: I object to the question because it is argumentative—if you do thus and so.

Mr. Allen: It is cross-examination, your Honor.

The Court: Objection sustained. Go ahead.

Mr. Allen:

Q. If you made any such statement to Dr. Thompson, Mr. Jeffcott, whom did you contemplate would put the pressure on Dr. Donovan? [33]

Mr. Robertson: Same objection. It still constitutes a very argumentative form of question. The witness has said that he did not make such a statement. You cannot state if I took a pot shot at the President of the United States, what would be my frame of mind.

Mr. Allen: He has testified that he cannot remember whether he made such a statement, and that he did not think he would have made such a statement, and I brought out that he just did not think he made such a statement, and now I ask him how he would have gone about putting pressure on Dr. Donovan.

The Court: Answer the question.

A. In the first place, I had never heard of Dr.

(Testimony of David C. Jeffcott.)

Donovan before, and in the second place, I did not know for whom he worked or where he worked. If I had made such a statement, and I don't believe I did, I do not know how I would have gone about it, because I am not in the habit of doing those things. I can do it on my ranch, of course, but I am not acquainted with Dr. Donovan and I do not know Dr. Palmer well.

Mr. Allen:

Q. You know that he has been your father's attending physician [34] for many years, do you not?

A. I know Dr. Palmer because Dr. Palmer has seen me upon two or three occasions, but you don't put pressure on your friends like that.

Q. You lived in New York for quite a length of time during your life, have you not?

A. No, sir.

Q. Do you mean to say you have never lived there?

A. For over a period of three weeks, I don't think I have ever been in New York. My home is in New Jersey.

Q. You have been more or less familiar with the city of New York during much of your lifetime, have you not?

A. As anybody who would live in Patagonia would be familiar with Tucson.

Q. In the course of that familiarity with the City of New York, you have also gained a pretty good idea that fees for professional services in New

(Testimony of David C. Jeffcott.)

York, as compared to fees in small communities in the country, are high, have you not?

A. No, sir, I have had very little experience with that.

Q. You have had some experience in employing specialist surgeons in your life, have you not?

A. To my knoweldge for myself I never have employed them.

Q. You have been under the care of specialist surgeons during your life, have you not?

A. Your Honor, may I repeat the operations I have had in my life, to clarify that? It is not clear the way I have to answer that. [35]

The Court: The only question called for just a "yes" or "no" answer, I think.

A. I think the answer would be "yes."

Mr. Allen:

Q. And you know also that those surgeons or that surgeon were or was paid a substantial fee for the specialized care you received?

Mr. Robertson: Once again I object to the word "substantial". Mr. Allen might ask the nature of the operation and the amount paid and leave it up to the court as to whether it was substantial.

Mr. Allen: I don't think I am limited to such strict wording on cross-examination.

The Court: The witness may answer the question.

The Reporter: (Reading)

Q. And you know also that those surgeons or

(Testimony of David C. Jeffcott.)

that surgeon were or was paid a substantial fee for the specialized care you received?

A. To the best of my recollection, the fees were reasonable.

Mr. Allen:

Q. Now, what were your intentions in reference to Dr. [36] Donovan's charges when you sent him the twenty-five hundred dollars?

A. I don't remember exactly at the moment what I wrote Dr. Donovan when I sent him that check, but as I recall my intentions at that time, and I believe I indicated them in that letter, or previous ones, that was the extent of our ability to pay him at that time, and that some time at a later date, we perhaps would be able to pay him more.

Q. That was not until August 14, 1939, that you finally transmitted that partial payment, was it?

A. I think that is the date.

Q. And you wrote a letter of transmittal at that time, did you not?

A. Yes, I sent a letter with it.

(A two-page letter marked Plaintiff's Exhibit No. 3 for Identification.)

Q. I hand you Plaintiff's Exhibit 3 for Identification, and ask you to examine that and state whether or not that is the letter with which you transmitted the payment of twenty-five hundred dollars.

A. Yes, sir, that is the letter I wrote him.

Q. And that bears your signature, does it not?

A. Yes, sir, that is my letter.

(Testimony of David C. Jeffcott.)

Mr. Allen: I offer this letter as Plaintiff's Exhibit 3. [37]

Mr. Robertson: No objection.

The Court: All right. Admitted.

(Letter, Plaintiff's Exhibit 3 for Identification, marked as Plaintiff's Exhibit 3 in evidence.)

[Plaintiff's Exhibit No. 3 is set out at page 11 of this printed record.]

Mr. Allen:

Q. As a last paragraph there, Mr. Jeffcott, you stated or wrote to Dr. Donovan at that time the following, did you not? I will ask you to read the last paragraph of that letter.

A. Aloud or to myself.

Q. Aloud.

A. (Reading): "I feel very unhappy that any question of cost should enter into what you did for our baby. And it seems to me unappreciative that you should not promptly have received any payment, so I have managed to secure the highest figure the local doctors named and enclose herewith check for \$2500. We have thereby freed our consciences and if you choose to sue for any more I cannot help it for I have done my best and my situation has been explained to you. Of course, if things ever broke right for me and I could properly afford it I would like to do some more for you in

(Testimony of David C. Jeffcott.)

order that you would [38] think as well of us as we did toward you.”

Q. That is a correct reading of the last paragraph of that letter?

A. I think so, sir.

Q. Now, after you sent that communication, you had some further communication with Dr. Donovan, did you not?

A. I believe I received a letter from Dr. Donovan to the effect that he had received my check, but of course could not accept that for full payment, and I believe I answered that. I am not sure on that score.

Q. You made no demand upon him to return the twenty-five hundred dollars after you received such letter? A. Not to my knowledge, sir.

Mr. Allen: That is all the cross-examination of this witness, your Honor.

The Court: Does counsel desire a recess of about five minutes?

Mr. Allen: If we may, your Honor.

The Court: We will take a ten-minutes recess.

(After a short recess, the hearing was resumed.) [39]

Mr. Allen: May I have the privilege of qualifying one further article of correspondence by this witness while he is on the stand?

The Court: Go ahead.

(Letter, David C. Jeffcott to Arthur T. Schmidt, marked Plaintiff's Exhibit 4 for Identification.)

(Testimony of David C. Jeffcott.)

Mr. Allen:

Q. I hand you Plaintiff's Exhibit for Identification No. 4 and ask whether or not you wrote that communication and signed the same.

A. Yes that is mine.

Mr. Allen: I offer it in evidence as Plaintiff's Exhibit 4.

Mr. Robertson: No objection.

The Court: It will be admitted.

(Plaintiff's Exhibit No. 4 for Identification, a letter, admitted in evidence and marked Plaintiff's Exhibit No. 4.)

[Plaintiff's Exhibit No. 4 is set out at page 14 of this printed record.]

Mr. Allen:

Q. Now, the truth of the matter about your decision to have Dr. Donovan come to Tucson is——

[40]

The Court: What is your question, Mr. Allen?

Mr. Allen: I have not completed it.

Q. The truth of the matter about your decision to have Dr. Donovan come to Tucson rather than to have this operation in New York was that it was easier and more convenient to you. Is that correct?

A. To me, personally?

Q. That you regarded it as more convenient, that it would be easier.

A. As a matter of fact, I had been looking forward to that trip to New York.

Q. You stated in this letter, Plaintiff's Exhibit 4, did you not, that that was the reason?

(Testimony of David C. Jeffcott.)

Mr. Robertson: May I suggest that the witness be shown the letter in connection with the question.

Mr. Allen:

Q. I call your attention to the third paragraph of that letter.

A. May I read this aloud?

Q. Yes.

A. (Reading): "Contrary to your advice there was no feeling that the child couldn't go to New York or elsewhere, but it seemed easier and more satisfactory for the doctor to [41] come here than for the child and a nurse to go to the doctor."

Q. In other words, your decision in that respect was made as one of convenience, wasn't it?

A. I believe that I used that word in there, yes, sir, that it would be more convenient, that more people would not be drawn out of *out of* their normal schedule if the doctor came here.

Q. What I am getting at is that those were the elements that caused you to make that decision, rather than any feeling that the child might not survive the trip to New York, or might not survive the operation if the trip were made.

A. There were many things that entered into that decision. That was written nine months later and during nine months many things developed that never came out at the moment the decision was being made.

Q. Now, do you still expect to have Dr. Dono-

(Testimony of David C. Jeffcott.)

van perform any further surgery that may be needed by your son?

Mr. Robertson: We object to that question. Certainly it is beyond the scope of this case. Surely since that letter was written, the relations between Dr. Donovan and Mr. Jeffcott could hardly be as friendly, and to ask Mr. Jeffcott on the stand even right now whether he expects to have Dr. Donovan perform a simple hernia operation is rather beyond the scope of the case. [42]

Mr. Allen: I withdraw the question rather than argue about it.

Q. You did indicate in that letter of March 2, 1940, that you still intended to have Dr. Donovan perform the further surgery that might be needed by your son?

A. I think that is a natural conclusion. If Dr. Donovan did the first operation, I think he should do the second.

Q. You did so advise him at that time?

A. I advised Dr. Donovan?

Q. Or his attorney, Mr. Schmidt.

A. I believe I wrote that in the letter.

Q. Was that written in there by way of an expression of your high regard of his ability as a surgeon?

A. I think so, yes, sir.

Examination

By Mr. Robertson:

Q. If you should have Dr. Donovan perform the

(Testimony of David C. Jeffcott.)

operation you have referred to, would you leave it to a reasonable fee, or have an agreement as to the fee?

A. With several years, rather than a very few hours, to make a decision, of course it would be an agreed amount.

Q. You would not leave it up to the doctors on the case to conduct the negotiations for you?

A. When I have any knowledge, I had rather conduct them myself.

Q. Now, Mr. Jeffcott, I would like you to read Plaintiff's [43] Exhibit 3 and Plaintiff's Exhibit 4.

A. This carries my letterhead, and is dated Patagonia, Arizona, August 14, 1939.

(The witness thereupon read Plaintiff's Exhibit 3.)

This other letter is with my letterhead, dated March 2, 1940, to Arthur T. Schmidt.

(The witness thereupon read Plaintiff's Exhibit 4.)

Q. Those letters, Mr. Jeffcott, were written before this suit was instituted? A. Yes, sir.

Q. Both of them? A. Yes, sir.

Q. Prior to the time you received Dr. Donovan's bill for twelve thousand five hundred dollars, shortly after the first of May, did you have any preconceived idea of your own as to what the fee would probably amount to? A. Yes, sir.

Q. And did you have such an idea at the time

(Testimony of David C. Jeffcott.)

you consented to Dr. Thompson employing Dr. Donovan, or a general idea or figure in your mind?

A. Yes, sir, I had a figure in my mind.

Q. What was that figure?

Mr. Allen: I object to that, your Honor, as beyond the scope of cross-examination of this witness, and further that it was not disclosed in any of these letters. It is absolutely immaterial as to what he had in his mind. [44]

Mr. Robertson: It is just as material as the subsequently acquired idea that Dr. Donovan had that the services were worth twelve thousand five hundred dollars. There was no meeting of minds and consequently it is to be left up to the court to decide. The ideas that the respective parties had is to be considered in determining a reasonable fee. They lay stress on the fact that Mr. Jeffcott permitted Dr. Donovan to be employed. What he expected the bill to be when he did this or did that are matters which the court should consider along with the other evidence in the case.

Mr. Allen: I interpose a further objection, your Honor, that only experts are qualified to testify as to the reasonableness of the fees of a surgeon. I make that objection, and the additional objection that the question calls for an answer wholly immaterial, and that the witness is not qualified as an expert.

Mr. Robertson: I agree with Mr. Allen that only doctors are permitted to answer hypothetical

(Testimony of David C. Jeffcott.)

questions as to the value of services, but the defendant in the case and the person who employed the doctor, when asked "Why did you permit Dr. Donovan to be employed", should be permitted to state what his expectations were, I think. [45]

The Court: I am going to sustain the objection. I do not think the plaintiff would be bound by what was in the mind of the defendant here at the time the services were rendered.

Mr. Robertson: If that be true then we are not to be bound by anything that might have been percolating in the mind of Dr. Donovan. The ideas of both parties as to what constitutes a reasonable fee for the services are material. As to whether or not they are controlling, that goes to the weight of the testimony. Mr. Jeffcott is asked why he permitted Dr. Donovan to be brought out here, whether it was fear that the life of the child might be jeopardized, and now I can ask what fee he contemplated paying, and then they can go into the background as to why Mr. Jeffcott thought such a fee was reasonable, and that this fee of twenty-five hundred dollars which he finally paid to Dr. Donovan was considerably higher than what he anticipated, but it was as a result of the top figure the doctors he consulted in Tucson gave him as a reasonable fee for the services and expenses of Dr. Donovan. Mr. Jeffcott should be permitted to state what he expected the fee to be when he permitted Dr. Thompson to employ Dr. Donovan.

The Court: Of course the whole question, so far

(Testimony of David C. Jeffcott.)

as the compensation of the physician is concerned, is what under all circum- [46] stances was a reasonable fee.

Mr. Robertson: That is correct.

The Court: I do not think the question as to what the defendant had in his mind at the time would be an element in determining what a reasonable fee would be, and I am sustaining the objection, Mr. Robertson.

Mr. Robertson:

Q. As stated in your letter, Mr. Jeffcott, before sending this check to Dr. Donovan, did you discuss this matter with physicians and surgeons in Tucson? A. Yes, sir.

Q. As stated in your letter, was the figure of twenty-five hundred dollars the highest figure that any one of those doctors gave you?

A. Yes, sir.

Mr. Allen: Object to that as calling for a hearsay statement.

Mr. Robertson: It is brought forth in an exhibit introduced by the plaintiff.

Mr. Allen: The exhibit speaks for itself. [47]

Mr. Robertson: I am not asking for the statement made, but asking if it is the highest figure that he secured from any doctor.

Mr. Allen: It is permitting hearsay from someone else as to the amount of the fee, without an opportunity for the court to inquire as to their knowledge. Hearsay is not limited to statements

(Testimony of David C. Jeffcott.)

but actions and everything else. The question is whether it is introducing through this witness the evidence of some other witness, some other person.

The Court: What is the answer?

The Reporter: (Reading)

Q. As stated in your letter, was the figure of twenty-five hundred dollars the highest figure that any of those doctors gave you?

A. Yes, sir.

Mr. Robertson:

Q. Immediately prior to the time when Dr. Donovan was called to come to Tucson, and on the day of his arrival, what was your state of mind, so to speak? Were you calm or were you disturbed?

A. I was very much disturbed, as would be fitting a layman who had no ideas of any such thing, or ever even conceived of their happening. [48]

The Court: A little louder.

A. I was very much upset, as I believe any layman who had no knowledge of things like that ever happening in the case of children that were born.

Mr. Robertson:

Q. And upon whom did you rely for advice as to what the baby needed, and what should be done?

A. I believe more than any other doctor upon

Dr. Hugh Thompson.

The Court:

Q. Who is that? A. Dr. Hugh Thompson.

Mr. Robertson:

Q. Dr. Hugh Thompson was the staff doctor of

(Testimony of David C. Jeffcott.)

the Desert Sanatorium who was taking care of the child after its birth?

A. Yes, sir, of necessity, the doctor being there in the sanatorium and my wife being there and the baby there, we would, of course, see more of him than any other doctor.

Recross Examination

By Mr. Allen:

Q. This letter, Plaintiff's Exhibit 4, which you wrote to Mr. Arthur T. Schmidt, as you state therein, was by way [49] of belated reply to his letter of December 6, 1939. That is correct, is it not? I refer you to the first paragraph therein.

A. "Because it seemed to me that my letter of August 14th last fully covered the matter, and because I wanted to think this matter over further, I failed to reply to your letter of December 6th, last."

Q. Continue.

A. "Your letter of February 10th seems to intimate that my August 14th letter was not clear. Of course I want the matter amicably adjusted—that was the reason for my sending Dr. Donovan check for \$2500, when my advisers were telling me that such an amount was a considerable overcharge."

Q. Do you have in your possession Mr. Arthur T. Schmidt's letter of December 6, 1939?

(Letter produced by Mr. Robertson.)

Mr. Allen: I would like to offer that in evidence.

(Testimony of David C. Jeffcott.)

The Court: Has it been marked yet?

The Clerk: Plaintiff's Exhibit 5.

Mr. Allen: If your Honor please, I would like to call Dr. Hugh Thompson next, and I talked to him during this brief [50] recess and he had three patients in his office, and asked if he might appear at two o'clock. I suggest that we take our noon recess at this time.

(Thereupon the court took a recess until the hour of two o'clock in the afternoon, at which time the trial was resumed.)

DR. HUGH THOMPSON

called as a witness herein on behalf of the plaintiff, having been first duly sworn, according to law, to testify to the truth, the whole truth and nothing but the truth, was examined and cross-examined and testified as follows:

Direct Examination

By Mr. Allen:

Q. Your name is Hugh C. Thompson?

A. That is right.

Q. Where do you reside, Dr. Thompson?

A. Tucson.

Q. San Clemente Addition? A. Yes.

Q. You are a licensed and practicing physician within the state of Arizona? A. Yes, sir.

(Testimony of Dr. Hugh Thompson.)

Q. How long have you been engaged in practice in Arizona? A. Since January, 1939. [51]

Mr. Robertson:

Q. Pardon me, what was that date? 1939?

A. Yes.

Mr. Allen:

Q. Where were you engaged in practice prior thereto? A. Albany, New York.

Q. Are you acquainted with the plaintiff in this action, Dr. Edward J. Donovan? A. I am.

Q. Are you acquainted with the defendants in this action, Mr. David C. Jeffcott and Mrs. Elsie Jeffcott? A. I am.

Q. What was your professional employment, if any, on or about the 24th of March, 1939?

A. I was on the staff of the Desert Sanatorium.

Q. To what extent was your professional time occupied by such employment?

A. Completely.

Q. You were devoting your time wholly to acting as a member of the staff of that sanatorium or hospital? A. That is right.

Q. Did you have any connection, any professional connection, with the case of Robert Jeffcott, the infant son of these defendants?

A. Yes, sir, I attended the child.

Q. When did your professional attention to that case begin, Dr. Thompson? [52]

A. A few hours after its birth.

Q. Where was that child, Robert Jeffcott, born?

A. At the Desert Sanatorium.

(Testimony of Dr. Hugh Thompson.)

Q. And who, if you know, was in attendance upon Mrs. Jeffcott as her physician?

A. Dr. William Carrell.

Q. Will you state what, if any, particular or specialized field of professional work you were doing at the sanatorium?

A. Largely pediatrics.

Q. Will you state, Dr. Thompson, what occasioned your being called on to, or assigned to the case of the Jeffcott baby?

A. Dr. Carrell asked me to see the baby several hours after birth, because it had an intestinal hemorrhage.

Q. How long thereafter did you continue on the case of the Jeffcott baby?

A. For approximately six to eight months.

Q. Now, will you describe to the court what attention you or other physicians in your presence extended to the Jeffcott baby during the first six or seven days of its life, including (if I may interrupt, Dr. Thompson) you might as well include in that statement, a statement of the condition of the child.

A. At birth the baby had seemed perfectly normal. A few hours after birth, it vomited, which in itself is not remarkable. A few hours later it passed blood by rectum in sufficient amount to be definitely

[53]

abnormal, and it continued to pass blood by rectum intermittently for about forty-eight hours. The child was given blood intermuscularly, that is, into

(Testimony of Dr. Hugh Thompson.)

the muscle, and also was given blood into the veins twice.

Q. During what period?

A. During the first twenty-four hours of life. The child then gradually ceased to bleed but it continued to vomit abnormally. It vomited intermittently up to the time of the operation. On the third, fourth and fifth day, I believe, of life, it passed stools which seemed somewhat normal, but thereafter did not do so, did not pass normal stools. About the fifth day of life, it became evident from the fact that the intestinal contractions became evident through the abdominal wall, it became evident that the child had at least a partial obstruction of the intestines. It was not at that time complete. I judge that because the baby was having some stools. About the 31st of March, that is when the child was seven days old, I felt convinced that the obstruction was not going to be relieved, and because the baby vomited bile instead of simply the contents of the stomach, I felt the obstruction was in the small intestine itself, rather than at the junction of the stomach and intestine, which is the more usual location of obstruction in young infants. During this period, and particularly the last two or three days of this first week of life, the baby had been given a fluid, salt [54] solution and water under the skin and into the vein to maintain its body fluids. On the 31st of March, when I became convinced that the child had an intestinal obstruction of the small intestine which was not going to subside, I com-

(Testimony of Dr. Hugh Thompson.)

municated with Dr. Carrell, the obstetrician, and told him my opinion and my feeling also that the baby would have to be operated upon.

Q. Now, Dr. Thompson, had any other physicians or surgeons been called on to that case up to the seventh day of life of the infant?

A. No, sir.

Q. Was anyone else called at that time?

A. At that time there was.

Q. Who was called?

A. Dr. Vivian Tappan.

Q. What is her specialized field of practice, if any?

A. She is a pediatrician.

Q. Where does she practice?

A. Tucson.

Q. What took place then, Dr. Thompson, after you made this report to Dr. Carrell?

A. There was a consultation between Dr. Tappan, Dr. Carrell and myself.

Q. What was the subject matter of such consultation?

A. First the diagnosis, confirmation of the diagnosis, and second who should be the surgeon.

Q. It was or was not decided at such conference that an [55] operation should be performed?

A. It was so decided and the baby was x-rayed and given a meal by mouth containing barium to show up the point of obstruction, and the point of obstruction was confirmed by x-ray.

Q. When was it that the ultimate decision to operate was reached in relation to the x-ray?

(Testimony of Dr. Hugh Thompson.)

A. Immediately.

Q. What, if anything, was done in the course of the consultation relative to the consideration of who should perform such operation?

A. Dr. Carrell said we would have to obtain someone outside of Tucson, as he felt there was no surgeon in Tucson competent to perform such an operation.

Q. What further took place in that regard?

A. I asked Dr. Tappan whom she would suggest, and she suggested two names, Ladd, of Boston, and Donovan, of New York.

Q. What further took place?

A. I agreed those were the two men I had had in mind and as New York was a little closer than Boston, and as I knew of Dr. Donovan and his work, I felt he would be the logical choice.

Q. What further discussion was had at that time concerning the choice of Dr. Donovan, if any?

A. The three physicians agreed we should recommend Dr. Donovan to Mr. and Mrs. Jeffcott.

Q. Did anything further take place in that conference as to [56] the choice of a surgeon?

A. No, we then went in and communicated our opinion to the parents.

Q. Where did you communicate that opinion to them?

A. In Mrs. Jeffcott's room, as I recall.

Q. In the sanatorium? A. Yes.

Q. Who was present?

(Testimony of Dr. Hugh Thompson.)

A. Dr. Tappan, Dr. Carrell, Mrs. Jeffcott, Mr. Jeffcott, and I believe a nurse was present.

Q. Mr. Jeffcott was present?

A. I believe he was.

Q. Now, what was done at that conference on the part of you physicians, with the parents?

A. I believe I acted as spokesman for the three physicians, since I had been in charge up to that time. We told them what we considered the nature of the case to be and the necessity for an operation, and who and why we felt should operate on the child, and we were then authorized to go ahead.

Q. Whom did you indicate to them you felt should operate on the child?

A. Dr. Donovan. We told them that so far as we knew there were only two physicians who could do it. I neglected to say that in the conference before we saw the parents, we discussed the possibility of physicians closer to Tucson, and I asked Dr. Tappan if she knew of any physician, [57] any surgeon, on the Coast who was particularly skilled in children's surgery, or in Chicago or St. Louis, and she said she did not, and I did not either.

Q. Did you ask Dr. Carrell's opinion on that point?

A. Dr. Carrell left the choice and all of that up to Dr. Tappan and myself, because he said he was not particularly conversant with children's surgeons.

The Court: Doctor, will you please speak louder. What is that answer?

The Reporter: (Reading)

(Testimony of Dr. Hugh Thompson.)

A. Dr. Carrell left the choice and all of that up to Dr. Tappan and myself, because he said he was not particularly conversant with children's surgeons.

Mr. Allen:

Q. Proceed, Dr. Thompson, to outline what took place in the conference with Mr. and Mrs. Jeffcott.

A. I was authorized to go ahead and communicate with Dr. Donovan. I was selected because I happen to know Dr. Donovan personally.

Q. Who made that selection, Dr. Thompson?

A. Dr. Tappan and Dr. Carrell said "You go ahead", as I recall.

Q. Was any comment made on that suggestion by the parents?

A. No, they agreed to the necessity for an operation and in our choice of a surgeon. It was at that time thought that the baby would be flown to New York by a nurse and a doctor. [58]

Q. That plan was discussed there with the parents, was it? A. Yes, it was.

Q. And that was the plan you were instructed to communicate to Dr. Donovan? A. Yes, sir.

Q. Was anything said by either Mr. or Mrs. Jeffcott at that time with reference to the expense of that procedure? A. No, sir.

Q. Did they make any comment or objection as to the probable amount of fee which would be involved for such surgical attention? A. No, sir.

Q. Did they instruct you at such time to inquire into the matter of the fee? A. No, sir.

(Testimony of Dr. Hugh Thompson.)

Q. What did you do pursuant to carrying out such instructions?

A. I called Dr. Donovan on the telephone, told him the nature of the case, and asked him if he felt our diagnosis was probably correct, told him that we felt that we would like to have him operate on the baby, and that we thought we could fly the baby to New York at that date, arriving in New York the next afternoon, and he said he would meet us at the Babies' Hospital in New York the next morning when we arrived.

Q. At what time of March 31st did that telephone conversation take place, approximately?

A. I would say around eleven o'clock in the morning, some [59] place probably between ten and twelve o'clock.

Q. What next developed within your knowledge in that regard, Dr. Thompson?

A. In the first place, I told the parents and Dr. Carrell that I had made the arrangement. I believe that Mr. Jeffcott inquired at the American Airlines office about reservations, and I made my own personal plans to leave that afternoon on the plane with the child, having talked with Dr. Tappan and found she was not particularly desirous of making the trip. We talked with the nurse who said that she could go, and we were making plans to depart that day.

Q. Then what, if anything, developed during the course of those plans?

(Testimony of Dr. Hugh Thompson.)

A. I met Mr. Jeffcott and he asked me if I thought Dr. Donovan would come out to Tucson.

Q. What response did you make, if any?

A. I said I would have to communicate with him and find out whether he would consider making the trip and at that time I asked him if money was any object to him in making the arrangements.

Q. What response, if any, did he make?

A. He said "No".

Q. What instructions, if any, did he give you at such time in reply to negotiating with Dr. Donovan to come to Tucson? [60]

A. He asked that I call Dr. Donovan again and see if he would come out immediately to Tucson.

Q. What was done as a result of that conversation?

A. I called Dr. Donovan on the telephone and asked him if he would come out. Dr. Donovan said first that he had never flown out, but did not say he would not come. I told him then that Mr. Jeffcott had said that money was no object, and that we would like very much to have him come.

Q. What response then, if any, did he make?

A. He said he would come and he did.

Q. Do you remember, Dr. Thompson, whether any conversation was had between you and Dr. Donovan at such time relative to his means of transportation and his connections?

A. Yes, we mentioned that there was a plane leaving that afternoon, and he said he would do

(Testimony of Dr. Hugh Thompson.)

everything possible to catch it; that he would call the airlines immediately and see if he could get on that plane.

Q. About what time was that second conversation had with Dr. Donovan?

A. I believe about one o'clock p. m. I shall have to confirm that.

Q. You mean mountain time?

A. Yes, our time here.

Q. Do you know what time that plane departed from New Jersey?

A. I think I will have to correct that, Mr. Allen. As I recall, now, I think it was about one p. m. New York time when [61] that second conversation occurred. I believe Dr. Donovan had three or four hours to catch the plane. I think the plane left at five o'clock New York time.

Q. In any event, you discussed his schedule in coming here by plane?

A. Yes.

Q. When did he arrive here, Dr. Thompson?

A. The following morning.

Q. At about what hour, if you know?

A. I think it was about six o'clock. It was either six or eight. I know I met the plane—met him at the plane.

Q. Describe what occurred, what took place thereafter relative to Dr. Donovan regarding surgical attention to the Jeffcott baby.

A. We drove immediately to the Desert Sanatorium from the airport, and in a very short time

(Testimony of Dr. Hugh Thompson.)

Dr. Donovan viewed the x-rays and saw the child. He agreed with the diagnosis and remarked on the way from the airport to the Desert Sanatorium that the chances were it was a volvulus and after he saw the x-rays that impression was strengthened. The baby was operated on that noon. Dr. Donovan performed the operation.

Q. Who was present when the operation was performed, as far as you know?

A. Dr. Victor Gore, Dr. Vivian Tappan.

Q. In what capacity? [62]

A. They were there as observers. Dr. Carrell, Dr. Van Horn as anaesthetist, and myself as assistant.

Q. And the usual retinue of nurses?

A. The nurses were present.

Q. Will you describe the pathology as found in the course of that operation?

A. The intestine was not in the usual position. Ordinarily during the development of a child in the uterus, the intestine which originally is a straight tube, rotates and turns as it grows. Whereas the junction of the small and large intestines is in the right lower part of the abdominal cavity, in this child, apparently due to failure to rotate, it was in the left upper part of the abdomen—in the left upper, instead of in the right lower. Now, the intestine is attached to the back of the abdominal wall by a thin membrane which is called the mesentery. In this case, the intestine had twisted around its

(Testimony of Dr. Hugh Thompson.)

own mesentery, thereby shutting off, to a certain extent, the blood supply and causing what is known as a volvulus or kink and had rotated around its own membrane attachment two and one-half times, two and one-half rotations. In addition there was a failure of the usual connection between the membranous attachment of the stomach and the transverse colon and the first part of the small intestine, which ordinarily does not do so, had passed through the mesentery, of the last part of the small intestine. In addition, there was a firm fibrous [63] band which held down the last part of the intestine, and that band was acting as an obstructive agent, preventing the passage of the intestinal contents through.

Q. What condition did the small intestine appear to be in at the time of the opening of the abdomen?

A. The part above the obstruction was distended and the part below the obstruction was collapsed, owing to the fact that nothing had passed into it for some time prior to the operation.

Q. Was there any indication on the lower part, the collapsed part, which would indicate the extent to which the blood supply had been impaired?

A. The blood supply had definitely not been shut off long enough to kill the intestine. In other words, the intestine was not dead.

Q. Necrosis apparently had not developed?

A. No.

(Testimony of Dr. Hugh Thompson.)

Q. What was the color of the collapsed colon?

A. As I recall, a dusky purple.

Q. What is its normal color?

A. Pinker, lighter.

Q. What was done by Dr. Donovan, with your assistance, for the surgical correction of that mal-rotation?

A. The fibrous band was cut. The intestine was rotated so as to unkink it and the junction of the small and the large intestine was placed down in the right lower part [64] of the abdomen where it belonged and secured there by sutures. The abdomen was then closed with several types of sutures. It was apparent when the band was cut and the obstruction relieved that the obstruction had been relieved, because material passed into the collapsed portion. You could see it begin to expand and the color became normal.

Q. Dr. Thompson, will you explain the further course, or outline the further course of Dr. Donovan's attention to the case?

A. Dr. Donovan remained at the Desert Sanatorium over night and for the greater part of the following day, during which time the condition of the child was in every way satisfactory.

Q. Dr. Thompson, do you know, and if you do know will you state to the court what the custom is among surgeons who do specialized work, with reference to their continuing on a case after the performance of specialized surgery?

(Testimony of Dr. Hugh Thompson.)

A. That obviously depends on whether the surgeon is resident in that town or not. If the surgeon is not resident in that town, they usually return to their own home.

Q. At what point?

A. As soon as they feel the operation is doing satisfactorily, sometimes the same day, within an hour or two.

Q. What is your opinion, Doctor, as to the advisability of Dr. Donovan having remained longer in attendance, taking [65] into consideration the condition of this infant at the time of his departure?

A. I cannot say that it would have altered in any way what happened to the child, nor did any of us at the time see any necessity for his remaining.

Q. In other words, it was satisfactory to all three local attending physicians that he depart at that time and that the child be restored to the care of the local physicians?

A. Yes.

Q. I believe you say you continued on the Jeffcott baby case quite a number of months after the operation?

A. Yes, sir.

Q. Will you explain to the court the post-operative course of such patient, including also any treatment that might have been provided in connection therewith, any examinations which might have been made throwing light on the condition of the baby?

A. For several days post-operatively the baby's condition seemed entirely satisfactory. The child was fed and retained its food normally and passed

(Testimony of Dr. Hugh Thompson.)

normal bowel movements. Because of the danger that the baby might cry and break his wound at the time, the dressings were not changed for the first several days. This was done on the suggestion of Dr. Donovan and is customary. However, despite all of our precautions, the dressings became saturated with urine. On I believe the fifth post-operative [66] day, the temperature of the child went above normal, and that was considered an indication, inasmuch as the rest of the physical examination was negative, for changing the dressings. When this was done, it was discovered that the wound had become infected. At that time the child was seen by Dr. Carrell and Dr. Tappan, as indeed it had been during the entire post-operative course, and the wound infection was given routine surgical treatment. I believe I am correct in saying that at that time also the opinion of Dr. Gore was asked, and at that time the opinion of Dr. Carrell and Dr. Gore were relied upon because they were surgeons and I was not. On the ninth post-operative day, the character of the discharge from the wound, the infected wound, changed and it became evident that there was a communication between the wound and the intestine, a fecal fistula. This condition continued for quite a few days and for a day or two during this time the condition of the child did not seem very good. However, after persistent medical treatment and a good deal of attention to the wound itself to prevent the digestion of the tissues by the

(Testimony of Dr. Hugh Thompson.)

intestinal contents, the discharge of the wound gradually became less and the child's condition improved.

Q. Now, Dr. Thompson, during the post-operative progress and during the care and attention being given to the Jeffcott baby relative to this fecal fistula, did you make any reports to Dr. Donovan? [67]

A. I did. I telephoned him as soon as it became evident and I communicated with him by letter several times during the post operative course.

Q. Did you secure any counsel and professional advice from him in that regard?

A. Yes, I did.

Q. In other words, his attention continued from a consultant's view point throughout the course of that post-operative period?

A. Dr. Donovan was informed fully of everything that happened to the child during its stay in the Sanatorium and gave me advice and suggestions on it.

Q. Now, Dr. Thompson, how long—I withdraw that question. What examinations were made by you or brought to your attention in the form of medical reports throughout the post-operative period which would indicate to you the degree of success of that operation, the extent of recovery of the patient, and at what time were those brought to your attention?

A. The fact that the operation was a success was very clearly demonstrated by the fact that the

(Testimony of Dr. Hugh Thompson.)

child began to eat without vomiting and pass normal stools from the time the operation was performed and thereafter, and without the operation the child would absolutely have died.

Q. Did you make any examination or take any x-rays subsequent to the operation which would indicate the position [68] of the G I organs, the gastric intestinal organs?

A. X-rays were taken a few days after the appearance of the fecal fistula and they were taken simply to determine, if possible, the location of the fistula. X-rays were also taken in Patagonia, in the office of Dr. Minier, by me several months after the child had been discharged from the hospital. The x-rays in the Desert Sanatorium at the time of the fecal fistula consisted in giving barium by mouth. The x-ray in Patagonia consisted in giving barium mixture by mouth. Both of those x-rays revealed without any question the intestines were in their normal location. In other words that the junction of the large and small intestines was in the lower right of the abdomen where Dr. Donovan had placed it.

Q. Now, Dr. Thompson, in your professional opinion, what effect, if any, should the development of that fecal fistula by the Jeffcott baby have upon the reasonableness of the charge for the services of the surgeon? A. None.

Q. When, with reference to that x-ray taken at Patagonia, did you discontinue your attention upon the child in the case?

(Testimony of Dr. Hugh Thompson.)

A. Shortly thereafter.

Q. What would you say as a pediatrician was the general condition of the child at that time, and particularly the condition of its gastric intestinal tract? [69]

A. The condition of the child was excellent. The nutrition was good, and it was doing very nicely. The wound had a pin-point spot from which there was an occasional small amount of drainage at that time. I was subsequently informed——

Q. By whom?

A. ——by Dr. Carrell, I believe, that the discharge had ceased entirely.

Q. How long was that after your last x-ray?

A. I think about two months.

Q. Now, Dr. Thompson, what type of quarters did Mrs. Jeffcott have at the Desert Sanatorium?

A. She had a private room.

Q. How did its rate of cost to the patient compare to other rooms in the Sanatorium?

A. I believe it was one of the better rooms in the surgical division, that is, the division where the obstetrical and surgical patients were kept.

Q. How many nurses were on duty in her attendance and attendance upon the infant, during the time Dr. Donovan was present in Tucson for the surgical attention upon the baby?

A. I am not sure about the nurses in care of Mrs. Jeffcott. There was one private nurse on duty all of the time. In other words, there were day and

(Testimony of Dr. Hugh Thompson.)

night nurses for the baby, and for a time there were two day and two night nurses, special nurses who did nothing else. [70]

Q. Now, subsequent to your negotiating with Dr. Donovan pursuant to those instructions given you by Mr. Jeffcott, by virtue of which Dr. Donovan came to Tucson, rather than the baby going to New York, did either Mr. or Mrs. Jeffcott discuss with you the matter of fee? A. No, sir.

Q. How long have you known Dr. Donovan?

A. I first saw Dr. Donovan in June, 1929, when I was a substitute interne at St. Luke's Hospital. I was subsequently an interne in St. Luke's Hospital, during which time, although I was not on his service, I saw him from time to time.

Q. Now, Dr. Thompson, will you state to the court what, if anything, you know about Dr. Donovan's professional schooling in preparation for his carrying on of his professional activity?

A. I believe he attended the College of Physicians and Surgeons at Columbia University; that he interned at St. Luke's Hospital, and at least one other hospital, and I think at two. That he has practiced continuously since his entrance into practice upon the staff of both St. Luke's Hospital and the Babies' Hospital, in New York, and that for a considerable number of years he has been one of the chief surgeons at St. Luke's Hospital. There are, incidentally, four chief surgeons at St. Luke's.

Q. What does that rank indicate, by way of comparison? [71]

(Testimony of Dr. Hugh Thompson.)

A. Well, it is attending surgeon. You start in as assistant, then to principal, and then you go up to full attending surgeon. Dr. Donovan has been for a number of years an attending surgeon, which means that decision in difficult cases is left to the chief surgeons. He has been the chief surgeon at the Babies' Hospital in New York for at least twelve years, to my knowledge. The Babies' Hospital is the division of the Columbia University and Presbyterian Medical Center where all of the children are cared for.

Q. Pardon me. Had you completed your statement in reference to Dr. Donovan's training?

A. He was associated, I believe, with Dr. Downes, who is one of the first great children's surgeons, and by children's surgeons I mean surgeons who particularly do children's surgery in this country.

Q. Have you any knowledge as to the extent of that association, duration of it?

A. I think I am correct in stating that he was associated with Dr. Donovan when he first practiced surgery. I believe I am correct in that. And he is generally regarded in New York as the leading children's surgeon in the city.

Q. Now, Dr. Thompson, have you specialized in pediatric practice largely since your admission, original graduation and admission to practice?

A. Yes. [72]

Q. I ask you to state whether, in the course of your practice, you have been accustomed to attend

(Testimony of Dr. Hugh Thompson.)

district meetings or national meetings of any pediatric societies or organizations.

A. Yes, I have.

Q. Please state what meetings of that character you have attended.

A. American Academy of Pediatrics, of which I am a member, with one or two exceptions, since 1935. I have also attended two national conventions of the American Medical Association and numerous district and state meetings.

Q. Has it come to your attention through the course of your attendance at such meetings, to what extent Dr. Donovan's eminence in pediatric surgery is known and to what extent recognized?

A. He is recognized nationally.

Q. Do you know whether he has any connection with the faculty of Columbia University?

A. Yes, I believe that he is a clinical professor of surgery or professor of clinical surgery, I am not sure which.

Q. In the course of your medical study, Dr. Thompson, either before you were licensed, or in the course of your practice as a pediatrician, have you had occasion at any time to consider the writings of Dr. Edward J. Donovan on pediatric surgery?

A. Yes, I have read several articles by him.

Q. I will ask you to state whether you have had occasion to [73] consider and read any case records written by him?

A. Yes, I have.

Q. I ask you to state what those might indicate

(Testimony of Dr. Hugh Thompson.)

to you, with reference to his ability or standing, if anything.

A. They indicate that his standing is very excellent. The only way to judge that—it is rather difficult to judge—is the quality of publications in which the articles appear, and he has, for instance, contributed to the American Journal of Diseases of Children, which is certainly one of the two best pediatric journals in the world, and he has, I believe, in fact I know he has written a contribution for the Nelson's System of Surgery, which is one of the outstanding systems of surgery in the English language.

Q. What is the name of that last publication?

A. Nelson's Loose-leaf Surgery.

Q. That is in the nature of a surgeon's encyclopedia, is it, Dr. Thompson, and if not, what is it?

A. Yes. Articles on each branch of surgery are contributed by men who are considered outstanding in that particular branch, and the system is kept up-to-date by having the articles revised as new developments occur in that particular branch.

Q. Are you familiar with Christopher's Textbook of Surgery? A. I am.

Q. Has Dr. Donovan made contributions to that publication? A. I believe he has.

Q. And what use is Christopher's Textbook put to?

A. As a reference book for men practicing medicine, and [74] as a teaching textbook.

(Testimony of Dr. Hugh Thompson.)

Q. Now, Dr. Thompson, from the knowledge gained by you in your practice of pediatrics, from the knowledge you have gained from attending these sundry meetings of pediatric associations or organizations, based on that and such other knowledge as you may have on the subject, who, in your opinion, is the most eminent pediatric surgeon in this country?

Mr. Robertson: I object to that because it has been answered just four times, and, if necessary, I shall stipulate that Dr. Thompson thinks that Dr. Donovan is the most eminent pediatric surgeon in this country.

Mr. Allen: I am very much surprised at the divining powers Counsel has displayed, but incidentally I don't think Dr. Thompson regards Dr. Donovan as the most outstanding pediatric surgeon in the United States.

Mr. Robertson: I think it would save time if I would so stipulate and I am willing to do it.

Mr. Allen: Very well. I was going to introduce in evidence that Dr. Ladd of Boston is.

Mr. Robertson: He is pretty good, too, but I will stipulate that Dr. [75] Donovan is the best.

Mr. Allen:

Q. Having so stipulated, we will depart from the examination on that subject. In the course of your practice of medicine in the State of New York, have you, and if you have, to what extent, have you become aware of and acquainted with the practice and

(Testimony of Dr. Hugh Thompson.)

custom in and about New York City on the part of eminent surgeons who give specialized attention in some particular field of surgery, as to the amount of fees which they charge for the performing of operations within such specialized field?

Mr. Robertson: I object to the question, because the custom or any circumstances or conditions existing in the state of New York is entirely immaterial in the trial of this case, because the services were performed in the city of Tucson, and I can cite authorities to the court if there is any doubt.

Mr. Allen: I can cite a few myself, your Honor.

The Court: The principle the counsel has announced, I find is the principle announced in *Corpus Juris*. [76]

The Court: I overrule the objection.

Mr. Allen: Will you please read the question?

The Reporter: (Reading)

Q. In the course of your practice of medicine in the State of New York, have you, and if you have, to what extent, have you become aware of and acquainted with the practice and custom in and about New York City on the part of eminent surgeons who give specialized attention in some particular field of surgery, as to the amount of fees which they charge for the performing of operations within such specialized field?

Mr. Robertson: I have another objection. The first part of the question is "Have you become acquainted" and the second part is "To what extent". I object to the multiplicity of that.

(Testimony of Dr. Hugh Thompson.)

Mr. Allen:

Q. I can split it up. Have you, doctor?

A. I believe so, yes.

Q. To what extent, doctor?

A. To the extent that I know of the usual fees charged by perhaps eight or ten surgeons who specialize in a branch of surgery for certain operations which they perform. [77]

Q. Now, Dr. Thompson, based upon your knowledge concerning the schooling and general training, specialized training and experience, of Dr. Donovan, based upon your knowledge of his standing and of his eminence as a specialized pediatric surgeon, or as a surgeon giving specialized attention to the surgery of infants, based upon your knowledge of and participation in the employment negotiations through which Dr. Donovan was employed and under which he did operate on the Jeffcott baby; based upon your observation of and knowledge concerning the condition of the Jeffcott baby before the operation; based further upon your observation and knowledge of and concerning the operation and your participation therein; based further upon your observation and knowledge as to the condition of the Jeffcott baby throughout the post-operative period of several months following the operation; and based further upon your knowledge of the practice and custom of specialized surgeons in and about the city of New York, what, in your opinion, would constitute a reasonable charge to be made by Dr.

(Testimony of Dr. Hugh Thompson.)

Donovan for the performance of the operation which he performed in your presence upon the Jeffcott baby?

Mr. Robertson: The principal objection I have is that the hypothetical question contains no facts showing the financial condition of the defendants in this case, and my other objection is that the customs in New York have nothing to do [78] with it. There is nothing contained in the hypothetical question as to the financial condition of the parties and Dr. Thompson has not stated in what way the financial condition of the parties to pay the bill is to be considered by the eminent surgeon who is making the charge, and that was the principal error in the famous case of Citron vs. Fields, where the testimony of the society doctor was thrown out.

(Argument.)

The Court: I overrule the objection.

Mr. Allen:

Q. Do you desire the question read?

The Court: The last question would be what would be the reasonable value of such services.

The Witness:

A. May I answer in more than two or three words? I would like to say that in view of the type of operation, the age of the patient, the skill and eminence of the surgeon and the outcome of the operation, I feel that the surgeon is justified in charging as high a fee as any surgeon would charge for any operation, and from what I understand to be

(Testimony of Dr. Hugh Thompson.)

the maximum charges made by physicians of [79] similar eminence, I would say that fee would be in excess of ten thousand dollars, and that does not take into account any ability of the patient to pay.

Mr. Robertson: I move to strike the answer for the reason that it is not responsive. The answer clearly demonstrates that the opinion is based on only certain portions of the evidence in the case, and entirely ignores the evidence as to the ability to pay, and for the reason that in a part of the answer he states that he thinks that this particular surgeon should be entitled to charge a fee equal to the highest fee that has been charged by another surgeon, which is wholly ridiculous and preposterous, without any regard whatsoever for the ability of the patient to pay, the amount of time devoted to the operation, and other circumstances which a court is bound to consider.

The Court: The motion will be denied.

Mr. Allen: Take the witness.

Cross Examination

By Mr. Robertson:

Q. In other words, Doctor, it is your belief that Dr. Donovan in this case would be justified in charging [80] a fee which is equal to the highest fee any surgeon has ever charged?

A. Reasonable fee, Mr. Robertson.

Q. And what enters into your determination of what is a reasonable fee?

(Testimony of Dr. Hugh Thompson.)

A. If you leave out the ability of the people to pay?

Q. I say, what enters into your determination of what is a reasonable fee?

A. A reasonable fee is based on the service performed, the skill and eminence of the surgeon, and the ability of the people to pay.

Q. That is correct. You also know that even in New York, the ability to pay is a test of the charge, of the amount that the surgeons charge?

A. Not necessarily.

Q. But as a general practice?

A. No, I beg to differ with you. And I know this, and I can give a good many instances of surgeons or physicians who are busy who do one of two things, in general. They see poor patients in the hospital clinics for nothing, and do a great deal of it. When people come to their offices or request an operation or a delivery or something of that sort, they frequently have a set fee for that particular thing. If the patient says "I cannot pay that", they will say, "All right, go to Dr. Jones around the corner. He is good and he will do it for less than I will do it". That is their practice. If [81] you say you cannot pay, they will say, "All right. I am sorry".

Q. You are acquainted, either personally or by knowledge of standing, with Dr. William A. Downes, are you not?

A. Yes, sir.

Q. You consider him to be one of the leading and most eminent surgeons in New York?

(Testimony of Dr. Hugh Thompson.)

A. I believe he is.

Q. Do you also know, either personally, or by knowledge of his standing, Dr. Carl G. Burdick?

A. I do.

Q. And do you likewise know Dr. Fenwick Beekman?

A. I know who he is.

Q. Would you say they represent the higher, more eminent physicians in New York?

A. They do.

Q. Would you say that the yardstick of measurement of a fee of those men is representative of that class of people in New York?

A. Yes. Now, I don't know what they charge. I have no personal knowledge of any fees ever charged by those men.

Q. But would you say that their practice and their system and the way they go about charging a fee is fairly representative of eminent physicians and surgeons in New York?

A. I do not know. There are surgeons who are eminent in [82] their profession who have entirely different ways of charging.

Q. What are some of the ways of charging a fee? What do they take into consideration in addition to the ability of the patient to pay?

A. They frequently do not take into consideration at all the ability of the patient to pay, Mr. Robertson. Sometimes they do and sometimes they do not.

Q. That is in cases where the fee is fixed in advance?

A. No.

(Testimony of Dr. Hugh Thompson.)

Q. Do you know any specific cases in which that was done? A. Yes.

Q. Will you please name the doctor and patient and the type of operation?

A. I am not able to do that.

Q. Can you give one illustration?

A. That would not be permitted. I cannot name the operation done on any patient by any physician. I think you will find that is in accordance with medical ethics.

Q. Now, Doctor, let us be fair about this. I know your interest is not personal in this case. Is it not a fact that the most eminent surgeons, Doctors Downes and Beekman and Burdick being in that class, take into consideration the ability of the patient to pay in determining the amount of a fee?

A. I think they do if a patient tells them ahead of time they cannot pay much. [83]

Q. Is that the only circumstance under which they ever do?

A. I think it is safe to assume that if the patient gives no appearance of being unable to pay, that when the doctor sends out his bill, he sends it for whatever he considers to be his fee for that particular service.

Q. You figure then that if he charges any fee he wants as a general practice, that that should be the yardstick of the reasonableness of that fee?

A. Will you repeat that question?

The Reporter: (Reading)

(Testimony of Dr. Hugh Thompson.)

Q. You figure then that if he charges any fee he wants as a general practice, that that should be the yardstick of the reasonableness of that fee?

A. No, not necessarily.

Mr Robertson:

Q. All right. What is it?

A. That is a very hard thing to answer, for this reason: I know of a surgeon in New York who has a reputation for performing a certain operation in which he is particularly skilled, asking a fee of twenty-five thousand dollars. Now, that fee is not reasonable for a man making a hundred dollars a week.

Q. That is right.

A. We know that. Most people making a hundred dollars a week don't go to that surgeon. They know ahead of time his reputation. They know a little bit about it. It [84] is the same thing as going in and ordering an automobile. You surely know you are not going to pay for a Chevrolet if a Packard is sent around to you.

Q. Yes.

A. It is partly based on your eminence. Your ability to do any particular thing in medicine is based on a great many factors. That patient is paying not for two days' services.

Q. That is true.

A. They are paying for years of experience, the fact that that doctor has worked for eight or ten years for nothing; that he has unusually dex-

(Testimony of Dr. Hugh Thompson.)

terous hands; that he has unusually good or unusually bad judgment, as the case may be. They are paying for his reputation. The fact that he is the outstanding man in that field gives them a certain feeling of security, the knowledge that he has done a certain number of operations with a minimum of mortality; in other words, instead of five out of twenty having died, when he has operated, only four out of twenty have died, and you pay for that.

Q. That is interesting, but is it not a fact that you and the doctors in New York, in making a charge where no previous fee has been agreed upon, that you take into consideration the ability of the patient to pay—and I submit that question may be answered “yes” or “no”.

A. If there is no great evidence of poverty, no.

Mr. Robertson: I move that answer be stricken and ask that he answer [85] “yes” or “no”.

A. Yes, if I know it. In other words, if I know the ability of the patient to pay.

Q. Then suppose, Doctor, that a charge is made and subsequently you find out that your preconceived idea of the patient's ability to pay is in error, is your first judgment absolutely binding forever? A. No.

Q. Then you would take into consideration the ability of the patient to pay?

A. I would.

Q. Would you say that testimony by Dr. Downes and Dr. Burdick and Dr. Beekman as to the gen-

(Testimony of Dr. Hugh Thompson.)

erally prevailing practice in New York would be apt to be more accurate than your own testimony as to the custom of charging fees?

A. Yes, I imagine so.

Q. They have been there longer and are more acquainted with how things are carried on?

A. Yes, I believe that.

Q. And the opinion you gave as to the reasonable fee in this particular instance took into consideration, or did not take into consideration, the financial circumstances of Mr. and Mrs. Jeffcott?

A. That is quite correct.

Q. When you communicated with Dr. Donovan on the telephone and told him that money was no object, you did not tell him that he could charge anything he wanted to, did you? [86]

A. No, I did not.

Q. You simply told him that money was no object?

A. Yes.

Q. So that the fee that Dr. Donovan may charge in this case should be based upon a consideration of all of the elements that go into the determination of whether a fee is reasonable. Isn't that true?

A. Yes, it is.

Q. In other words, it would not be your testimony, would it, that had Dr. Donovan sent in a bill for fifty thousand dollars, that that would constitute a reasonable fee?

A. I do not know, sir. I am not conversant with it.

(Testimony of Dr. Hugh Thompson.)

Q. You do not know whether a fee of twelve thousand five hundred dollars would be reasonable?

A. Leaving out the unknown factor that I am not competent to pass on, that would be a reasonable fee.

Q. And that unknown factor is the ability of the patient to pay? A. Correct.

Q. Now, Doctor, in connection with the repertoire of nurses and the fancy quarters that Mrs. Jeffcott and the baby were occupying, the quarters were the standard quarters for patients brought out there by Dr. Carrell?

A. No, not necessarily. There are different priced rooms.

Q. This was perhaps one of the more comfortable rooms? A. Yes. [87]

Q. Do you know what that room cost per day? A. No, I don't.

Q. There was not a very wide variance?

A. I think the rooms varied at that time from six to twelve dollars per day, if I am not mistaken.

Q. Is it not a fact that St. Mary's Hospital and the Desert Sanatorium make a flat rate for rooms for maternity patients, who come there?

A. Yes, I think they do. I believe that is correct.

Q. And that rate is somewhat lower than the standard per diem rate would be?

A. Yes, I believe it is. I am not absolutely certain. In fact, I rather think, Mr. Robertson, that that

(Testimony of Dr. Hugh Thompson.)

was not in effect at the time Mrs. Jeffcott was there. If it was in effect at that time, it was a special arrangement, because as I recall we did not open the nursery for about a year after that, or several months, in any event, and I believe it was then that the flat rate went into effect. I had nothing to do with the financial arrangements at the San.

Q. In any event, the nurses were there at your order, were they not?

A. I believe we felt it would be advisable, yes, to have a special nurse.

Q. In other words, you were in charge of this case as a pediatrician, were you not?

A. Whenever you suggest putting a nurse on a case, you [88] assume the ability of the patient to pay. If the patient says, "I cannot afford a private nurse", usually they get along without a private nurse. In other words, you make one of the regular nurses do double duty. For instance, if I send a child out to St. Mary's and say "We are going to put a special on with the baby" and they say "All right", she goes on, and if they can they cannot afford it, I try to make other arrangements.

Q. You suggested that this nurse be put on to take care of the baby?

A. I don't remember, but I believe I did.

Q. The care of this nurse was necessary for the proper attention to be given to that child?

A. Somebody should be with the child, yes.

(Testimony of Dr. Hugh Thompson.)

Q. And Mrs. Jeffcott was in no condition to do it herself? A. No, of course not.

Q. And Mr. Jeffcott would not make a very good nurse, would he? A. I don't know.

Q. So the care given the baby out there was not unreasonable, lavish or extraordinary, the care at the Sanatorium?

A. No, I don't believe so.

Q. When you had that conversation with Mr. Jeffcott—By the way, do you remember, when you asked him about money, is it not true that he said “No, anything within reason”?

A. I am quite sure he did not, Mr. Robertson. I am quite [89] sure his answer was one word.

Q. And that word was “No”?

A. Yes, that is right.

Q. And you did not know what he had in his mind as to what the fee might be?

A. No, sir, I did not.

Mr. Robertson: That is all.

Mr. Allen: I think, your Honor, that we will release this witness at this time, and would like the court to admonish the witness to the effect of the rule, and would like the indulgence of the counsel to release him from the presence of the court, because of his profession.

The Court: Are you going to require this witness to testify further?

Mr. Allen: I don't know. He may be desirable as a rebuttal witness.

(Testimony of Dr. Hugh Thompson.)

The Court: The rule has been invoked, Doctor. Except for here in court testifying or conferring with attorneys, do not talk about the case with others. Until released, you are, of course, under the rule. [90]

EDWARD J. DONOVAN

plaintiff herein, called as a witness in his own behalf, having been first duly sworn, according to law, to testify to the truth, the whole truth and nothing but the truth, was examined and cross-examined and testified as follows:

Direct Examination

By Mr. Allen:

Q. Will you bear in mind, Doctor, in the course of your testimony, as I shall attempt to do as counsel, that a lot of street noises intrude here, and endeavor to speak accordingly, so that you can be heard over and above the traffic.

Q. Your name is Edward J. Donovan?

A. Yes, sir.

Q. Where do you reside, Dr. Donovan?

A. Inglewood, New Jersey.

The Court:

Q. What did you say, doctor?

A. Inglewood, New Jersey.

Mr. Allen:

Q. What is your profession or occupation, Dr. Donovan? A. Surgeon.

(Testimony of Edward J. Donovan.)

Q. Where do you practice, doctor?

A. I practice in New York City.

Q. Where are your offices located?

A. 862 Park Avenue, now. [91]

Q. Where were they located on or about April, 1939?

A. 424 Park Avenue.

Q. In the City of New York?

A. Yes.

Q. Omitting any pre-college schooling you may have had, will you outline for the benefit of the court the extent of your training in schools for your profession?

A. Beginning with college?

Q. Yes.

A. I took the degree of Bachelor of Science from Hobart College in 1917, and graduated from the College of Physicians and Surgeons, which is the medical college of Columbia University, in New York City, in 1920.

Q. Did you have any further college training?

A. No further college training, no.

Q. I will ask you to state, doctor, whether or not, in connection with either or both of those degrees, you were graduated with any honors or were admitted into any honorary societies.

A. I graduated with *cum lauda*, Pi Beta Kappa, and with honors from medical college, Alpha Omega Alpha, which is the same for medical college that Pi Beta Kappa is in college.

Q. Did you say what degree you received from Columbia? The degree of M. D., did you say?

A. Yes, sir.

(Testimony of Edward J. Donovan.)

Q. Following that degree, or on receipt of said degree, what [92] further professional training did you have, doctor?

A. I had six months training in the Mary McLellan Hospital, Cambridge, New York; two years in St. Luke's Hospital, New York; four months training as resident in Lying-In Hospital in New York.

Q. Now, Dr. Donovan, when and where were you admitted to practice your profession?

A. I was admitted to practice in New York, about June 1, 1921.

Q. And where have you carried on the practice of your profession since such admission?

A. Entirely in New York City.

Q. Entirely in New York City?

A. Yes, sir.

Q. I will ask you to state, Dr. Donovan, what connection you have had with, or what positions you have held in hospitals as a surgeon other than your internship which you mentioned?

A. I received an appointment as assistant tending physician at St. Luke's—that is the lowest—where you start—and one year after I finished my internship there, during the year following the completion of my internship, I was made attending physician at the Babies' Hospital during that same year—that is, within one year after I completed my internship.

Q. What were your duties, Dr. Donovan, in your

(Testimony of Edward J. Donovan.)

capacity of assisting attending physician at those hospitals?

A. I did all of the emergency work, practically, at the [93] Babies Hospital, and did the emergency work at St. Luke's Hospital, four nights a week. I was on call four nights a week.

Q. Did such emergency work include the surgery at those hospitals?

A. That was all surgery.

Q. What further connections did you thereafter have in hospitals in the course of your practice, Dr. Donovan?

A. I was appointed consulting surgeon in three different hospitals in or about 1930. That was Yonkers General Hospital, at Yonkers, New York; Fitkin Memorial Hospital at Neptune, New Jersey, and North Westchester Hospital, which is in Mt. Kisco, New York.

Q. What were your duties in connection with those appointments?

A. As consultant.

Q. Now, Dr. Donovan, how long did your connection with St. Luke's and Babies Hospitals continue?

A. I am still at both of them.

Q. Through what ranks or through what employments have you progressed, and what rank or employment do you hold now in such hospitals?

A. About 1926, I was promoted to associate attending physician, which is the next rank above the one I have previously mentioned, at St. Luke's, and

(Testimony of Edward J. Donovan.)

at the Babies Hospital, and about 1930, I was again promoted to attending surgeon in each of those hospitals, which is the highest rank, as you are in charge of surgery when you [94] are attending surgeon. About 1926, I was elected to the American College of Surgeons.

Q. When were you made Chief Surgeon in the Babies' Hospital? A. About 1930.

Q. And St. Luke's?

A. About the same time. About 1931 or perhaps 1932, I was elected to the New York Surgical Society. About 1936 I was elected to the American Surgical Society. About 1938, when the American Board of Surgery was started, I was taken in as a charter member of the American Board of Surgery, and I have since, on several occasions, examined applicants for the American Board of Surgery.

Q. Now, Dr. Donovan, are there——

A. There is one more.

Q. Pardon me for interrupting.

A. I forgot one I meant to mention. About 1926 I was appointed assistant professor of surgery at the American College of Surgery at Columbia University.

Q. As to which of these organizations, if any, is membership dependent upon accomplishment or eminence?

A. The American College of Surgeons, you are not allowed to join—that is the way it was then—you are not allowed to join until you have been out

(Testimony of Edward J. Donovan.)

of college seven years, and then you have to report in writing, detailed report, of at least fifty cases, and summarize fifty other cases. In the New York Surgical Society, you *are elected* to the New York Surgical Society until [95] you have a rank such as associate attending surgeon, which is the middle one I have mentioned, in an accredited hospital in New York, and your election there depends to a large extent upon how many cases you have presented to the surgical section of the New York Academy of Medicine, which is an entirely different thing, or how many papers you have written. A great deal of stress is laid on how many cases you have presented to the American Academy of Medicine. The American Surgical Association includes, or has only one hundred and seventy-five members over the United States and Canada. and is without question the most exclusive and best surgical association in existence. Your election to that society depends entirely upon your ability, that is, they will not take a man there—it is very difficult to get in, is what I mean to say. They will not take a man there unless he has done a great deal of work of the proper kind, that is, a great deal of good surgery. In the American Board of Surgery, I was taken in as a charter member, and it means nothing more than that I was an attending surgeon at a hospital. It takes nothing more to get into that. I believe that is all. My position as assistant attending surgeon, I believe I have described. My being assistant pro-

(Testimony of Edward J. Donovan.)

fessor of surgery at Columbia means I have teaching to do throughout the year, and I will elaborate on that teaching, if you want me to do so. [96]

Q. You might briefly explain to the court what you teach.

A. I teach surgery of children. That teaching consists roughly of something like this: It is two kinds of work. One is to take a group—we have only the third and fourth year students to teach, because this kind of surgery is not taught previous to that time. The teaching consists in taking a group of from ten to twenty students on the ward, on the surgical ward, and having them present to me usually three or four cases that they have worked on and prepared. They present them to me. That is the so-called ward teaching. That is divided up among the members of the surgical staff so that each particular surgical man on the staff at the Babies' Hospital has to do that perhaps four times a year. There are probably twenty to twenty-four sections like that. Then there is a lecture in which you have the entire class, either the third or fourth year class, which consists of about one hundred members, roughly, where you present to them cases from your surgical service; that is probably ten cases I have picked at random I present to them and give a talk on each different type of case. They are supposed to be cases just as they come in surgical work, representing surgery in children or infants.

(Testimony of Edward J. Donovan.)

Q. Have you been called upon to write any scientific articles of surgical interest?

A. Yes, sir. [97]

Q. Will you state what articles you have written on that subject and where they have been published.

A. I have written a chapter in the Lewis Practice of Surgery, which has been referred to above. I have written a chapter in Christopher's Textbook of Surgery. Then I have been asked to write——

Q. Have you written anything for Nelson's Loose-leaf——

A. Excuse me, I meant to say Nelson's.

Q. At whose instance were those prepared?

A. Dr. Christopher, who is the man who gets out Christopher's Surgery, and by W. T. Pryor, who gets out Nelson's Surgery, at Hagerstown.

Q. What is the use and prominence of Christopher's Textbook?

A. I think it is considered one of the best single volume textbooks or surgery, and is used for reference, and I think it is used in a good many medical colleges.

Q. What is the use and prominence of Nelson's Loose-leaf Surgery?

A. That is loose-leaf and consists of a good many volumes and the advantage of that is that it is kept up-to-date by re-writing chapters, and being loose-leaf, the old chapter can be taken out and the new chapter put in, if something new has developed in

(Testimony of Edward J. Donovan.)

that particular chapter. That is a very high-class reference, a sort of encyclopedia of surgery. It covers everything.

Q. Now, Dr. Donovan, I ask you to state whether or not you have had occasion to appear before meetings of any of [98] the medical or surgical organizations of the nation as a speaker on surgery, and if so where and when, and upon what subjects?

A. I have been asked to speak a good many times, and that is not awfully unusual. That is, this group in Newark, New Jersey, or in town, or someplace, Connecticut, any place within a radius of thirty miles or so from New York—it is a very common occurrence to be asked to speak on a certain subject. I cannot tell you how many times I have done that.

Q. Have you appeared at any time before the American College of Surgeons? A. Yes, sir.

Q. When was that?

A. Well, at the regular meeting, which I think was two years ago.

Q. What participation, what part did you take in that meeting?

A. I took part in a panel discussion.

Q. On what subject?

A. Intestinal obstruction in infants. I also took part in a panel discussion at the American Academy of Pediatrics in Boston last year.

Q. Dr. Donovan, for how long a time was your

(Testimony of Edward J. Donovan.)

surgical experience and practice limited to the work done in St. Luke's Hospital and the Babies' Hospital?

A. Well, almost entirely. You see, once I got my appointments in each of those hospitals, I started to work. [99] It was sometime within the first year after I finished my internship.

Q. When did you commence private practice of surgery? A. In 1923.

Q. And have you, during any of the period of your professional activity, limited your practice exclusively to surgery? A. Yes, sir.

Q. Dr. Donovan, what particular training, if any, did you have, and under what surgeon or surgeons, which would tend to give you specialized training and experience and qualification in the performance of abdominal surgery in infancy?

A. I have been trained under and very closely associated with Dr. Downes, who was perhaps the first man in this country to make an attempt to separate the surgery of infancy from general surgery. He was then head surgeon of the Babies' Hospital.

Q. How long did you have that association with him?

A. From 1921 until about—Dr. Downes stopped active practice about—let me see—about 1927 or 1928.

Q. What was the nature of your association with him?

(Testimony of Edward J. Donovan.)

A. I was trained by Dr. Downes, that is, I had my internship under Dr. Downes. He was my chief surgeon. It was while I took my surgeon internship. I took my orders from Dr. Downes. I was his interne.

Q. Are you interested in the specialized field of abdominal [100] surgery in infancy?

A. Yes, sir.

Q. How long have you been so interested in that field of specialized surgery, doctor?

A. Well, really since 1923, or the year after I started to practice, the year after I finished my internship.

Q. How long have you been giving specialized attention to surgery of infants?

A. Since that time.

Q. How long have you been performing abdominal operations upon infants in substantial numbers?

A. Since 1923.

Q. Dr. Donovan, how long have you followed the course of devoting your professional attention exclusively to surgery?

A. Twelve years. Did you mean in the last question you are speaking of time I have been on my own, outside the internship?

A. Yes. Did you, while interning under Dr. Downes, at Babies' Hospital, have occasion to perform, or to assist in performing abdominal surgery?

A. I did not interne under Dr. Downes at Babies' Hospital, but I interned under Dr. Downes

(Testimony of Edward J. Donovan.)

at St. Luke's, and then worked under Dr. Downes at Babies' Hospital, that is, he was my boss, because he was in charge of surgery. My internship at St. Lukes was taken directly under Dr. Downes. [101]

Q. Now, Dr. Donovan, how many operations have you performed in approximation for the correction of intestinal obstruction?

A. I have not quite finished the last question. You asked about the training. Do you want me to go on with that?

Q. Pardon me.

A. Following Dr. Downes, Dr. Boling, who had previously worked under Dr. Downes, was appointed attending surgeon at the Babies Hospital, and also attending surgeon at St. Luke's Hospital, and I worked then under Dr. Boling, who wrote a textbook on surgery of infants and childhood somewhere along about that time. I worked under Dr. Boling then until about 1928. Dr. Boling died about that time. I do not know exactly the date but it was somewhere along in there. I think that is the training.

That completes your training in surgery in infants? A. Yes, sir.

Q. Could you state to the court approximately the number of operations you have performed upon infants in the course of your surgical practice, for the correction of intestinal obstructions?

A. May I ask you a question about that? Do you mean like we are considering here?

(Testimony of Edward J. Donovan.)

The Court: A little louder, doctor.

A. I want to ask if he means like we are talking about here. [102]

Mr. Allen:

Q. How many operations have you permormed for malrotation? A. Eighteen.

Q. How many surgical operations have you performed in general involving obstruction?

A. A good many. I could not tell you the number, sir.

Q. How many cases have you reported to the American College of Surgeons involving pyloric stenosis?

A. I have operated on more than five hundred cases of pyloric stenosis, and have reported three hundred and fifty of them in the literature.

Q. What was the mortality occurrence in those five hundred cases?

A. I reported one death in the first one hundred cases, and have had no deaths since, so the mortality at the present time is one death in five hundred and some odd cases.

Q. What is the surgical operation for pyloric stenosis?

A. It is the closing of the lower end of the stomach of a baby because of the overgrowth of one muscle, the circular muscle. The reason you have to operate on this baby is that he begins to vomit. Ninety per cent of them begin to vomit between the second and fifth week of life. Occasionally they

(Testimony of Edward J. Donovan.)

start to vomit a little before that or after that. The operation is to open the passage at the lower end of the stomach, an abdominal operation.

Q. Throughout all of your surgery, is there any particular [103] field of surgery in which you have specialized?

A. A great part of my surgery is abdominal surgery. Is that what you mean?

Q. Yes, if that happens to be your specialized field.

A. I have done more abdominal surgery than chest surgery. I have done some chest surgery, too.

Q. What is the relation of the volume of surgery done by you as to adult cases and infant cases?

A. I do a good deal of adult surgery. I do as much adult surgery as I do child surgery. I think it would be fifty-fifty.

Thereupon the court recessed until January 30, 1942, at the hour of ten o'clock in the forenoon, at which time the trial was resumed, with the same appearances as heretofore noted.

EDWARD J. DONOVAN

resumed the stand and was further questioned under direct examination.

Q. Dr. Donovan, I believe that at the afternoon recess yesterday, you had stated that you had also, in addition to performing in excess of five hundred

(Testimony of Edward J. Donovan.)

pyloric stenosis operations, performed some chest operations in a substantial number. What was the nature of those operations? [104]

A. —hernia, or what is commonly known as upside down stomach.

Q. Is that an abdominal operation?

A. It may be either an abdominal or a chest operation. I do them through the abdomen. Other men do them through the chest.

Q. How many of those operations have you performed?

A. I performed fifteen. I reported twenty, thirteen of which I had operated upon. I have since done five. I have operated about eighteen.

Q. Now, Dr. Donovan, how many operations have you performed for complete obstruction similar to the operation in issue here?

A. Eighteen.

Q. And what other operations have you performed in substantial number?

A. Well, I am sure I have removed over two thousand appendices. I have done hundreds of hernias. I have done a great number of stomach operations for cancer and ulcer. I have done a great many operations for cancer of the large intestine and rectum. In St. Luke's in the last two years, I was given that particular branch of surgery to do, to take charge of. I have done a good many goiter operations. In other words, I cannot think of any ordinary abdominal operation I have not

(Testimony of Edward J. Donovan.)

done in considerable numbers, and I can think of several unusual operations that I have done in the abdomen.

Q. Now, Dr. Donovan, explain to the court the frequency [105] of the occurrence of the jejunal obstruction you found in the Jeffcott baby.

A. Well, the twenty cases I reported with Dr. McIntosh, eighteen of which had been operated upon—fourteen of these I had operated upon.

Q. When did you make such report with Dr. McIntosh approximately?

A. 1939. Those twenty cases go over the same period of time that the five hundred cases of pyloric stenosis go over, and since I was here, in a period of three years, I have operated upon four others.

Q. Now, Dr. Donovan, do you know of any pediatric surgeon in the United States who performs a greater number of that operation than you have?

A. The only way I have of determining that is by reports in the literature. That is the only way I can tell that.

Q. What are the indications?

A. There is no larger number reported in the literature that I have seen, or that Dr. McIntosh has seen.

Q. Handing you this printed document, I ask you to state what that is?

A. This is a reprint of our article, Dr. McIntosh's and mine, called "Disturbances of Rotation of the Intestinal Tract", published in the American

(Testimony of Edward J. Donovan.)

Journal of Diseases of Children by Dr. McIntosh and myself. Dr. McIntosh is professor of pediatrics at Columbia University. These were all disturbances in rotation of the intestinal tract. [106] Fourteen of these were operated by me.

Q. Does that article indicate the ones operated upon by you?

A. No, sir. I think it does mention the name of one man who operated upon one case.

Mr. Allen: I offer this in evidence as Plaintiff's Exhibit 6.

Mr. Robertson: No objection.

Reprint marked as Plaintiff's Exhibit 6 in evidence.

Mr. Allen:

Q. Dr. Donovan, what, or which, of these abdominal operations in infancy are the more serious, more delicate, from the standpoint of the probable success of the operation and the probability of recovery of the patient?

A. Any complete obstruction is as dangerous a thing as you can have.

Q. In other words, you regard that no abdominal condition could be materially more serious than that which was presented in this case?

A. Yes, sir.

Q. What factors, Dr. Donovan, bear upon the relative seriousness within that group of cases?

A. In that group of cases, there is a mortality of six, [107] that is, six in eighteen that were operated on died.

(Testimony of Edward J. Donovan.)

Q. What caused that high mortality?

A. Well, one of those patients died from shock. It undoubtedly was too much of an operation. Two of them died from peritonitis where the intestine had perforated, and three of the four I have operated upon since I was here, have died from the same reason. The intestine was perforated at the point of volvulus. One of those babies was operated upon before it was twenty-four hours old. Another baby was operated upon before it was thirty hours old. The intestine was already gangrenous.

Q. You say at the point of volvulus?

A. At the point of obstruction.

Q. What effect does the age of the infant have upon the seriousness of the operation?

A. A serious abdominal operation upon a young baby is quite a thing for that baby to go through.

Q. What effect does the age have upon the difficulty of the mechanical performance of the operation?

A. It does not have a great deal, if you are used to operating on babies. What does happen, you can operate upon any baby if its fluid has been restored—You can operate upon the baby up to a certain point and he resists very well, but when this baby begins to go bad, he goes bad very quickly. He will resist what you are doing to him up to a certain point very well, but after that point is passed, he will go down very rapidly. [108]

Q. How does the difficulty of performance and gravity of the surgical situation compare between

(Testimony of Edward J. Donovan.)

a serious condition on the part of an infant and a relative like serious condition on the part of an adult in an abdominal operation?

A. I think the same condition in an infant is much more serious. You cannot expect a baby four or five days old to withstand an operation that takes an hour or an hour and a half, when an adult will do it very well. The younger the patient, certainly the graver the risk.

Q. Now, Dr. Donovan, when were you first approached with reference to employment on the Jeffcott case?

A. On the first day of April, about—and I differ a little bit about the time than what was stated by witnesses previously, and I have several reasons for doing that.

Q. State what time you were first approached in that regard.

A. About half past ten, eastern standard time, or perhaps eleven o'clock, I received a telephone call at Atlantic City from Dr. Thompson of Tucson.

Q. What was the conversation with reference to your employment?

Mr. Robertson:

Q. What day was that, if I may ask?

A. It was April 1st, the day before I came here.

Q. It was Saturday?

A. Yes, it was Saturday. That conversation consisted in Dr. Thompson telling me he had a baby eight days old, who had complete intestinal obstruc-

(Testimony of Edward J. Donovan.)

tion, and asked me if I would meet him, tomorrow, Sunday, at the Babies [109] Hospital and see the baby and operate upon him if it was necessary.

Mr. Allen:

Q. What was said by you in reply to that request? A. I said I would do it.

Q. Was anything further said at that time as a part of those negotiations? A. No, sir.

Q. When did you next have any negotiations with reference to the Jeffcott case?

A. I think that the time of the second call was less than an hour later, and I will tell you the reason I think that. I was paged and went to a certain telephone booth for the first call, and I had not yet left the immediate vicinity of that telephone booth. I took the second call at the same telephone booth, and all I had done was to talk to Mrs. Donovan about changing our plans. I was in Atlantic City and had been there less than twelve hours. I talked with her about changing our plans, that I would have to go back to New York, to be there at ten o'clock the next morning.

Q. What took place at that time?

A. I was called again by Dr. Thompson from Tucson, stating that the parents wished me to come out here, rather than bring the baby to New York.

Q. What further was said by either of you in that respect? [110]

A. He told me I would have to fly. He told me what airline I should take and what time the plane left.

(Testimony of Edward J. Donovan.)

Q. From where was that plane due to depart?

A. Newark.

Q. What further conversation was had with reference to your employment or your trip?

A. I hesitated a little bit.

Q. Did you make that hesitation known to Dr. Thompson?

A. I think it was very obvious. I don't know that I said "I am going to think about this a moment". I was a little bit surprised by it. I had never flown before and it took me a few moments to think about it. I asked Mrs. Donovan if she had any objections to my flying, and then I told Dr. Thompson that I would come.

Q. Was anything further said at that time about the employment?

A. It was said previous to my decision to come.

Q. What, if anything, further was said?

A. That expense was of no consideration, or words to that effect.

Q. And you consented to make the trip?

A. Yes, sir.

Q. Now, how long thereafter did you have to prepare to depart on that trip? What did you do in that respect?

A. That is why I felt so sure about the difference in time. The first thing I did after that was to see if I could get reservations on that particular plane, from the desk in the hotel, and I think Mrs. Donovan did that for me, [111] and I do not know whether

(Testimony of Edward J. Donovan.)

they had to call Newark or not, but they determined that. I know I did not make the reservation. Either the man there made it or Mrs. Donovan made it. I had, as I remember, twenty or thirty minutes to get the train in Atlantic City to get me into Newark to catch the six-ten plane. I did not have time to pack thoroughly, and I forgot a great many things, which I had to buy in Newark.

Q. What effect, Dr. Donovan, did that need for immediate departure have upon your practice situation in New York?

A. I did not have time to call New York and arrange to have my patients taken care of.

Q. What was done in that respect?

A. Mrs. Donovan did it.

Q. When did you depart from Newark?

A. At six-ten.

Q. When did you arrive in Tucson?

A. At half past six, your time, next morning.

Q. What took place upon your arrival, Dr. Donovan?

A. I was met at the air field by Dr. Thompson. We went directly to the Desert Sanatorium, and I think we met Dr. Carrell there, and at any rate we examined the baby's x-rays, with Dr. Carrell, and then we examined the baby and determined an operation was necessary.

Q. Then what took place?

A. Dr. Carrell then asked me what I wanted to use in regard to instruments, and he arranged—

(Testimony of Edward J. Donovan.)

I gave him a list of [112] the things I would like to have, and he said they might not have them, and he took the trouble of going to some other hospital to get them—I think it was St. Mary's, but I am not sure about that name. I do not know whether I had breakfast there or not, but I went to church while he was getting the instruments, and then he picked me up again, either on his way back, or made a special trip to get me—I do not know which—and we took a little ride around, a very short one, because I had set the time of operation at the Desert Sanatorium for half past ten. He showed me a little of the scenery and we went back to the Desert Sanatorium together before the time set for operating on the baby.

Q. Then what took place?

A. We operated upon the baby.

Q. Just at that point, Dr. Donovan, what pathology or condition did you find with reference to this infant?

A. All that you can do in a case like this, or all we felt sure could be done at that time—I have a few more ideas now—you can make a diagnosis of complete obstruction, but you cannot say it is volvulus or what it is. You can say, "The baby has a complete obstruction".

Q. What does that mean?

A. It means he must have an operation. The reason I say that is that there are certain things that determine complete intestinal obstruction and this

(Testimony of Edward J. Donovan.)

baby had all of them, and I shall enumerate them if you want me to. [113]

Q. What condition did you find after making the incision and getting into the abdomen?

A. We found the baby had a complete intestinal obstruction which, inside the abdomen, is determined by the fact that one portion of the intestine, that is the portion above the obstruction, is dilated and below the obstruction is collapsed, and this obstruction in that Jeffcott baby was in the jejunum and that obstruction was due to volvulus, which means to turning or twisting of the intestine around the root of the mesentery as an axis. The axis of the turn is the root of the mesentery. That was the volvulus. The result of that volvulus was that the portion above the obstruction was dilated, as it is in all complete obstructions. The portion below that point was completely collapsed and blue or purple, as the circulation is interfered with by the obstruction. In addition to the two and one-half turns of the volvulus, there were other things. For example, there was a thing that very often goes with that. There was a failure of fusion of different membranes in the upper abdomen, that is, the membrane that connects with the stomach and the large membrane that runs transversely. When you see that, it may be the first indication you have mal-rotation, an evidence of failure of fusion. That was present. That in itself might make you look for a mal-rotation as cause of the obstruction. In addition

(Testimony of Edward J. Donovan.)

to that failure of fusion, this baby had a band, a very thick band, a devel- [114] opment band, running across this same small intestine that was obstructed. In addition to those things, the duodenum in this baby, the first small part of the small intestine, normally comes down beneath the stomach or transverse colon, and then comes out. In this baby, the duodenum, instead of going down, across and out, came directly down and passed through an opening in this same mesentery of the last part of the small intestine—passed through an opening in that mesentery.

Q. What is the mesentery and what is its function?

A. It is a membrane that really completely surrounds the intestine and suspends the entire small intestine, which consists of about twenty feet, a membrane that completely surrounds it, and then suspends it and allows it to move.

Q. To what is this mesentery attached?

A. To the back wall of the abdomen, and the thing that is called the root of the mesentery is a structure that runs across this way (indicating) and is normally about that long (indicating), so that the small intestine is suspended, through which runs the superior mesenteric artery that supplies blood to every bit of the small intestine, and to half of the large intestine, so that when that turns on the root of the mesentery that blood supply is compromised for all of the small intestine and half of the large intestine.

(Testimony of Edward J. Donovan.)

Q. Was this opening in the mesentery through which the colon passed normal or abnormal?

A. Abnormal. There should be no hole there. [115]

Q. What have you to say as to the normal or abnormal condition existing at that point?

A. I think I have covered it.

Q. What effect, Dr. Donovan, does this impairment of blood supply have upon the portion of the intestine below the point of obstruction?

A. It depends entirely upon how long it is interfered with. In the cases I mentioned that had perforation, the perforation was caused by gangrene of perhaps a little spot or a large section of the intestine. If you interfere with the blood supply of any portion of the intestine sufficiently, it becomes necrotic. It dies.

Q. Necrosis means death?

A. Yes. That necrosis may be a little pin-hole size area or may be the entire small intestine and half the large intestine, as supplied by the large artery, as reported in one of the cases that is in that report.

Q. Explain what was done by you to correct that abnormal condition you found in the Jeffcott baby.

A. The first thing that was done—This volvulus is always turned in a clockwise direction, and you turn it back, counter-clockwise to undo the twist. That was done first, turning it back two and one-

(Testimony of Edward J. Donovan.)

half turns so that the obstruction is relieved, and you determine that by seeing gas and contents of the intestine pass to the collapsed portion. The second thing that was done was to remove the band I have spoken about.

Q. What was that band? [116]

A. It is called a developmental band. It is a band.

Q. What is its substance?

A. It is the same as the lining membrane of the abdomen, the peritoneum.

Q. It was a congenital mal-formation?

A. Yes.

Q. Proceed with the description of the operation.

A. That band was removed. The thing that produces a volvulus is the mal-rotation, and the mal-rotation is the failure of fusion of the right side of the colon or the cecum to the back wall of the abdomen, where it should be attached.

Q. That failure of fusion accounts for the mal-rotation, permits it?

A. Permits it. That cecum and ascending colon is supposed to be attached, the ascending colon, strictly speaking. The cecum is not attached. The ascending colon is attached, and that makes a difference of an inch. The ascending colon normally is attached to the back wall of the abdomen. So, in order to prevent a recurrence of the volvulus, you suture the ascending colon to the peritoneum—to the lining membrane—and in the right lower quadrant, where it should rightly be attached.

(Testimony of Edward J. Donovan.)

Q. Was that done? A. Yes.

Q. What further was done?

A. I think that is all. The abdomen was closed in the [117] usual manner, and in a baby you take particular pains to sew a baby's incision up in layers, and the reason for that is this: A baby's incision is sewed in layers for the reason that children under five years of age have a great tendency to break their incisions open, and the reason for that is that a baby does not lie quietly like an adult, but kicks and moves, and apparently it does not pain him to move as an adult, and provisions must be made against that. And the other point is that the abdominal wall of a baby, even though it has all the layers of an adult, is predisposed to a rupture of the incision. You take each individual layer and sew it with sutures, and in addition you put in a retention suture. You put in a suture of non-absorbent material. These other sutures are absorbable. You don't have to take them out. The retention sutures are made of material that does not absorb. A retention suture is a suture that is passed some little distance outside the incision, through all the layers except the innermost layer, the peritoneum, and comes out on the other side of the incision, and is then tied over a band or rubber cuff so it will not cut into the skin. You never sew up a baby without taking these precautions. Another precaution, in addition to putting adhesive tape on this baby, you put on a bandage.

(Testimony of Edward J. Donovan.)

Q. For what purpose?

A. So he will not break open the incision. There is a great tendency in babies to break open. One other thing I [118] should have mentioned, you use in closing the skin a continuous stitch, a stitch that runs right along without interruption, and the reason for that is that even though a baby may break the lower part of the incision open, oftentimes the skin will stay together, and he may not break open to the extent he will have to be operated upon again immediately.

Q. What effect, if any, does the impairment of the blood supply to a portion of the intestines of an infant below the point of obstruction, have to do with the difficulty of performing the operation?

A. Occasionally it has been interfered with sufficiently so that you have to remove that intestine.

Q. Does it have any effect upon the handling or suturing of the intestine, in case you do not have to remove the intestine?

A. The intestine has to be handled much more carefully, and you have to be careful in suturing it, but I cannot say that that was particularly true of this baby, because you determine when you have relieved the obstruction. Oftentimes it is very dark and often it is a question as to whether you should take it out or leave it, so you do several things, such as hot pads, and you don't close that abdomen until you feel sure you do not have to remove that intestine, and while certainly an obstructed intes-

(Testimony of Edward J. Donovan.)

tine is more prone to infection passing through its wall than a normal intestine, we do not remove it if we can avoid it. [119]

Q. What further care and attention did you extend to the Jeffcott baby after the performance of the operation itself?

A. I saw the baby I don't know how many times. I remained in Tucson until the next morning, I think about eleven o'clock, during which time I definitely determined that the symptoms we had operated upon the baby for had disappeared, and I determined that in this way: That the baby had survived the operation very well and had had four bowel movements before I left, which showed the obstruction had been relieved.

Q. What was your decision before you left for New York as to need for your further attention?

A. I thought the baby was in very good condition, and I thought it was perfectly safe for me to go.

The Court: A little louder.

A. I thought the baby was in excellent condition. I had determined very definitely that the obstruction for which I had operated upon him was completely relieved, and I thought it was very safe for me to go.

Mr. Allen:

Q. Dr. Donovan, did you have any subsequent correspondence with any of the local attendants with reference to that baby's condition after its operation?

(Testimony of Edward J. Donovan.)

A. Yes, sir, I kept in pretty close touch with Dr. Thompson [120] with reference to this baby, and that was done by telephone once or twice perhaps, and by night letter and by airmail.

Q. What, if any, consideration did you give to the information received, and what, if any, advice did you give in response thereto?

A. It was a report on the condition of the baby primarily, because I had asked for a report, and if he asked me any questions about the care of the baby, I advised him to the best of my ability.

Q. Dr. Donovan, you understand, do you not that Robert Jeffcott, the infant in question here, developed a fecal fistula subsequent to the operation?

A. Yes, sir, I was informed of that.

Q. When, Dr. Donovan, did that develop?

A. The ninth day after the operation.

Q. What, in your opinion, Dr. Donovan, was the cause of the development of that fecal fistula?

A. I had a very detailed report about this fecal fistula, and I think that is the time Dr. Thompson called me on the telephone. I cannot be absolutely sure about that, but I think that is the time. I had a very detailed report, and I suggested what should be done about it, and then wrote certain questions again about it, about the fecal fistula, asking if the lining membrane of the intestine had shown up in the fecal. The question I asked was whether mucous membrane had shown up in the fecal fistula. [121] That is a very important question, and I asked that

(Testimony of Edward J. Donovan.)

of Dr. Thompson and got a reply. We talked it over. I don't remember what questions I asked. I stated what I thought should be done about it.

Q. What was your opinion as to its cause?

A. The fact that it was a fecal fistula——

Mr. Robertson: If these opinions were incorporated in any sort of writing, the writing would be the best evidence, and I insist upon the production of such writing.

The Court:

Q. Were those opinions in writing?

A. By writing, by telephone and by night letter. I cannot say how much of this was in my writing. I got a very detailed report of this fistula, and I wrote back certain questions to be answered in Dr. Thompson's next report to me about the fistula, which would help me in determining what to do with it. I cannot say how much was telephone, night letter or letter.

Mr. Robertson: I want the record to show an objection upon my part to any expression of opinion unless written opinions may be produced.

The Court: All right. Go ahead, doctor. [122]

Mr. Allen:

Q. I want to restate my question. I think it was originally what is your opinion now as to the cause of the fecal fistula. That is what I am asking now.

A. The character of the drainage of that being fecal, and that is a fecal fistula, in distinguishing it from an intestinal fistula, means a great deal to me, so I inquired about the drainage, whether it

(Testimony of Edward J. Donovan.)

was definitely fecal. I did state that I thought it was very probably due to the fact that the ascending colon and the first part of the large intestine had been sutured to the right lower quadrant, and that that had either caused an infection there or a necrosis there, because the blood supply of that intestine had been definitely interfered with.

Q. In other words it is your opinion it was due to the damaged condition of the intestine at the time the operation was performed?

A. It was due to the suturing, I mean the fixation, the fact that it was anchored. It was held there.

Q. And the damage to the intestine to which you refer, is that a condition that existed at the time the abdomen was opened, resulting in interference with the blood supply?

A. Yes. Do you want my reason for saying that?

Q. Yes.

A. My reason for stating that is that nine days after the operation is just about the right time for that to happen. One other reason is that this is definitely [123] fecal, so that rules out the small intestine, and it drained through the right side of the incision, so it would not be the left side of the colon that did it, and I thought it was because the right side of the colon was anchored where it had not been before, but where it belongs and has to be anchored to prevent a recurrence of the volvulus.

Q. That anchoring is a necessary portion of the operation for correction of the obstruction?

(Testimony of Edward J. Donovan.)

A. It is not necessary for the correction, but necessary to prevent a recurrence of it.

Q. Now, Dr. Donovan, what, if you know, is the frequency with which the development of such a fecal fistula can be expected in this type of operation?

A. It depends entirely upon the degree of interference with circulation. I cannot quote you any statistics, but it is directly related to the degree to which the blood stream has been impaired, the very same reason that perforation occurred.

Q. And what degree does the extent of impairment of the blood supply to a portion of the intestine, and the length of time during which that impairment has existed prior to operation, have upon the probability that fecal fistula will result from the necessary anchoring of the intestine?

A. Could I say one more thing before answering that?

Q. As far as I am concerned, yes. [124]

A. I think I should state in regard to fecal fistula, this fecal fistula might very well have been caused by infection where the ascending colon was attached, as there might have been a little abscess there, because this type of intestine, an intestine whose blood supply has been compromised by the obstruction, does very definitely prove that in that kind of intestine, organisms may pass through the walls, which they never do normally. The ninth day interval covers that, also that the drainage was likely

(Testimony of Edward J. Donovan.)

from the infected wound, particularly on the fifth day, when the temperature had gone up, which indicated that the drainage was not fecal but became fecal. That could all very well have been due to the fact that an abscess occurred where the membrane had been anchored which drained fecal material.

Q. What would have been the cause of such an abscess at that point?

A. Infection. Organisms either passing through the wall of the damaged intestine or death, necrosis, of a little portion of that intestine, perhaps where sutured.

Q. In both of which your opinion would have been that it was the result of, or growing out of the lack of blood supply in the intestine?

A. Yes, sir.

Q. Now, Dr. Donovan, during the time you were present here in Tucson, did you have any conversations whatever with Mr. or Mrs. Jeffcott, with reference to the cost to them [125] of this service which you had performed?

A. No, sir.

Q. Did they communicate with you by mail or otherwise at any time following your arrival in Tucson and prior to your submission to them of a statement indicating the amount of your charge?

A. No, sir.

Q. When did you determine the amount of your charge for this operation?

A. When did I determine it?

(Testimony of Edward J. Donovan.)

Q. Yes. A. After I had gone back home.

Q. How soon?

A. Sometime within the—I think it was a month before I sent a bill—sometime within that time. I think I operated on the baby either April first or April second, and I sent the bill May first—some-time between those two dates.

Q. Now, Dr. Donovan, what elements or factors do you take into account in the determining of a fee for an operation of this sort?

A. I answered that question in the interrogatories. If I may be permitted, I should like to refer to that answer, so that I may make it in the same language.

Mr. Robertson: I object to any such procedure. I should like to have [126] Dr. Donovan repeat what he took into consideration. Those interrogatories were prepared in Mr. Allen's office, with his assistance. I object to his being permitted to refer to his memorandum.

The Court:

Q. Can you summarize the elements, doctor?

A. Yes, sir.

Mr. Allen:

Q. Go ahead.

A. First, the seriousness of the operation that is to be performed; the age and condition of the patient. Second. I do not mean to put the condition of the patient in the first part. We will say the seriousness of the operation and the age of the pa-

(Testimony of Edward J. Donovan.)

tient. Second, the responsibility that I had to assume in operating on that patient. Third, my experience, my past experience in doing such an operation. Fourth, my knowledge of what other surgeons of the same training charge under conditions that are the same, or similar. Fifth, how much doing this operation is going to interfere with my other duties, such as other operations, appointments with patients, the normal course of my duties, whether it is going to interfere with my caring for any other patients, or seeing a new patient. Sixth, financial condition of the patient or the parents or the responsible person, some member of the family, if it is an adult; the hospitalization, the facilities or set-up.

Mr. Allen: Speak a little louder so that the court may hear you.

A. Well, the set-up, the room in the hospital that the patient has, the room, the nurse, how long the nurse was kept, and so forth. In other words, how much money that patient spends on his surroundings in the hospital.

Q. Now, Dr. Donovan, do you recall any other elements that you took into account?

A. I don't think so.

Q. Now, what elements, what did you have in mind in reference to the element of seriousness of that operation? What detailed elements do you take into account there, doctor?

A. Well, how sick the patient is, and what his condition is. Is he in condition to stand this opera-

(Testimony of Edward J. Donovan.)

tion right now? Should I do it now or wait until three hours from now and give him fluid and things like that. And I am responsible for all of those things. Should he have a spinal anaesthetic or a local anaesthetic? Has the patient diabetes perhaps? Has he any condition that I should know before I operate on him? Diabetes is a very good example of that. If I should operate upon a diabetic patient and not know it, I make a very serious situation for the patient. The same would be true of many diseases among them being high blood pressure.

Q. What detailed elements do you take into consideration [128] in the one you designate as degree of responsibility you assume?

A. Assuming this patient needs an operation, what are his chances of going through with that operation, because, particularly in an older patient, if it entails a great deal of suffering, as the operation may, it is not a bit unusual for a responsible member of the family to say "What are this man's chances of surviving this? Has he a good chance of getting well? If he hasn't, if he is going to suffer a great deal, I am not going to consent to the operation". I have the responsibility for all of that. What are my chances of taking him through such an operation?

Q. What are the details, items, Dr. Donovan, which you take into account in reference to the financial condition of the patient or a responsible party?

A. A great many of the patients that are sent to me, or to most surgeons, are referred patients

(Testimony of Edward J. Donovan.)

from any doctor, a medical man rather than a surgeon. A great many of the patients I see, I know nothing whatever about them.

Q. Why is that?

A. There are several reasons for it. Very often the doctor who has sent that patient to me will say: "Will you operate upon Mr. or Mrs. Jones (or whoever it is) for so much?" And I will say "Yes". Oftentimes the patient will say: "What is this going to cost me?" I can then sit down and talk it over with him or with her, and they [129] will say: "What is my hospital going to cost, and the anaesthetic? What extra charges are there for laboratory tests?" And I can sit down with that patient and go over all of it, insofar as I am able. Lots of patients, if the doctor has not said something about it, or if the patient has not said something about it—and this applies to a good many patients, my only way of determining that patient's ability to pay for the operation is the size of his room, how many nurses he has, how long he keeps them, what efforts he is making to keep expenses down—that is my only way of determining the amount that I should charge that patient.

Q. Now, Dr. Donovan, did you bring up the subject of fee in the Jeffcott case prior to the submission of your statement? Did you discuss it with them in any way?

A. Prior to the statement?

Q. Yes. A. No, sir.

(Testimony of Edward J. Donovan.)

Q. What is your custom in that respect?

A. I have never done it. I have never broached the subject myself to a patient once.

Q. What is the custom among the higher ranking surgeons in the New York area in that respect?

Mr. Robertson: I object to any testimony being given by Dr. Donovan or any other witness in reference to any custom in New York, because it is pure, rank hearsay, and I have no [130] opportunity to go into any such custom or practice. Such question assumes facts not in evidence in this case, and moreover a custom, unless it was acted upon in this case, is not admissible anyway, and moreover the patient was not in the city of New York, nor were the negotiations carried on in New York.

The Court: That was discussed to some extent yesterday.

Mr. Robertson: Yes, but these others are new elements. How can the defendants properly rebut any statements he may make here of what he may have heard from other people. It is purely the contractual relationship between Dr. Donovan and the Jeffcotts, if any existed. He can testify only as to what was done between them.

Mr. Allen: If it please the court, if it were purely a question of contract, there might be a very pertinent point in this objection, but it is not a question of contract, other than that the law implies a contract that these parents intended to pay a reasonable value and customary charges of the doctor

(Testimony of Edward J. Donovan.)

or surgeon who performed the operation which was needed by their infant son. It is incumbent upon the court here to determine the facts and circumstances that may have a bearing upon what constitutes a reasonable [131] charge for those services, looking into the service and the facts and circumstances surrounding the operation and the parties thereto. I believe it is conceded, so far as the law in this case is concerned, that a surgeon may show the condition, financial condition, of the responsible party, the defendants in this case. We have a question here—this witness has testified that in determining the fee, that he takes into account the financial condition——

The Court: That is the doctor's practice?

Mr. Allen: Yes. He has testified that he takes into account the negotiations. He has testified that he did not initiate any negotiations with these defendants as to the amount of fee prior to the submission of his statement, that is, prior to the determination of the amount of his charge. Now the examination is directed as to his reasons for that, and the court well knows that the members of the medical profession have very definite rules, very definite methods of procedure, and this testimony indicates that it is not his custom to do so. As to what is the prevailing custom or rule or practice, I think is pertinent to the court.

Mr. Robertson: This is a suit based upon an implied contract. He has [132] already testified that

(Testimony of Edward J. Donovan.)

it is not his custom to negotiate with a patient with regard to the fee. Therefore, if other doctors follow that custom, or, on the other hand, if they have a contrary custom, it is of no value to the court here, because his custom is to the contrary. He says: "No, I do not communicate with the patient, but simply send a bill". Of what value would it be to the court to show that all of the other doctors in New York do communicate with their patients before sending a bill. This must be based upon hearsay. It is impossible for Dr. Donovan to know how fifty-one percent of the doctors in New York do a certain thing. He may know a few who do it a certain way, but that does not establish any custom and usage, and is not sufficient to permit him to testify as to custom and usage in a court of law.

Thereupon the court announced a ten-minute recess, after which the trial was resumed.

The Court: In the recess, I have not been able to find any authority on the point of the question as to the testimony that the practice of physicians in the locality where he is located is the practice which he followed in this case. Your objection to it is that it brings into the record hearsay?

Mr. Robertson: That is correct, and as to assuming facts not in the [133] record, and it not being possible for us to examine persons who may have told them of any practices they had. I might add that I have not found any cases where any such consideration is considered by the court as one of the measures of deciding upon a fee.

(Testimony of Edward J. Donovan.)

The Court: The witness has already testified as to the elements he took into consideration in determining the amount of his fee.

Mr. Allen: And he has further testified that he did not initiate any discussion of fee himself, and now the inquiry is as to his reason for failing to initiate any such discussion.

Mr. Robertson: He says it was not his custom to ever contact a patient before——

Mr. Allen:

May I withdraw the question, your Honor, and save a lot of argument?

Q. Dr. Donovan, what arrangements were made for the care of your patients and practice in New York during the time you devoted to the Jeffcott case?

A. I was in Atlantic City and intended to be away until Sunday night, and I had arranged with a man, a doctor, [134] there to look after my patients while I was gone. Mrs. Donovan——

The Court: A little louder.

A. When I was asked to go to Tucson, I did not have time to make any arrangements myself. Mrs. Donovan called New York and said that I was going to Tucson, and asked this same doctor if he would continue to take care of my patients.

Mr. Allen:

Q. And what was done in that regard?

A. He did that. I did not at that time know how long I was going to be gone, or anything about it.

(Testimony of Edward J. Donovan.)

Q. Now, Dr. Donovan, what transfusions and infusions, if any, were given this Jeffcott baby subsequent to the operation, and why?

A. He was given a transfusion immediately after the operation. He was given then a continuous infusion, which is called an intravenous drip, that is, fluid in small quantities continuously, over a period of time.

Q. What was the purpose of that?

A. The purpose of a transfusion of blood immediately after an operation is to help to overcome the shock of that operation. It is just given on the general principle that there will be shock, and is given to help overcome that shock. [135]

Q. What is the purpose of the continuous infusion?

A. Where you have operated upon a portion of the stomach or intestinal tract, you have to be careful in giving fluids by mouth, and you have to give him fluids by hypodermic or in his vein, which is known as an infusion. The purpose is to keep his body fluids balanced, because if you do not keep his body fluids balanced he is not only uncomfortable but may vomit from lack of fluids which he cannot or should not take by mouth.

Q. These were part of the normal post-operative care?

A. Yes, sir.

Q. You have testified that you did not initiate any negotiations or conversations with these defendants relative to the amount of the fee, or their

(Testimony of Edward J. Donovan.)

financial ability to pay a fee. Why did you not initiate any such negotiations?

A. I had never done it before, nor have I done it since.

Q. Dr. Donovan, what elements or indications as to financial condition or ability to pay a reasonable fee did you take into account in this particular case, the Jeffcott case?

A. Well, I had been told——

Mr. Robertson: Just a moment. I object to the question, because appearances constitute no evidence of the true financial condition of the parties. [136]

Mr. Allen: That's a novel theory.

The Court: The witness was asked what appearances he took into consideration. Go ahead with the answer.

A. I had been told before I came that expense was no item, which I think at least assured me——

Mr. Robertson: I object to what he was thinking about.

The Court: Just what you took into consideration, doctor.

A. I repeat then that I was told before I came that expense was no item. I took into consideration the fact that money was never mentioned to me all of the time I was here, I mean, in regard to my fee. I took into consideration the same picture that I have stated I used in determining the finances of a patient, as I saw it when I came to Tucson, which was as follows: There was a small baby in a large

(Testimony of Edward J. Donovan.)

room, with four nurses taking care of him. There were three doctors in attendance and a surgeon had been called from New York to operate on him. I saw no evidence while I was in Tucson that anyone connected with the patient was worrying about expense. I think that is all. [137]

Mr. Allen:

Q. Now, Dr. Donovan, taking into account all of these matters concerning which you have testified, namely, your school training, your internships, your past experience, and, in general, all of those matters tending to indicate your qualifications, performance of the particular operation in issue, taking into consideration the negotiation for your employment, the nature of that negotiation; taking into consideration your employment as you have outlined it in full, and the performance thereof; taking into consideration the condition of the Jeffcott baby as you found it, what you did for the correction of that condition, the results therefrom; taking into account also the surrounding circumstances under which you were employed and did perform the operation; taking into consideration the communications to you and the information had by you in relation to your employment, and in the course of your employment, having to do with the financial condition of the parents of the Jeffcott baby, and, in fact, taking into consideration all of your knowledge concerning this matter, as you have testified here, what did you regard, on or about May 1, 1939, as

(Testimony of Edward J. Donovan.)

being a reasonable charge constituting the reasonable value of the services which you performed?

Mr. Robertson: I object to the question, if the Court please, because [138] in the first place it assumes facts not in evidence. He has testified that one of the considerations in normal cases in fixing a fee is the knowledge of what other surgeons charge for a service of a similar nature. That is based purely upon hearsay. I object further upon the ground that the question calls for his opinion at the time of the operation, or at the time the bill was sent. The evidence in this case discloses the true financial circumstances of the defendants. He has offered himself the evidence of their true financial circumstances, and so his opinion, without any thought being given to the true financial circumstances of the defendants, is of no assistance to the court in this case.

The Court: The question may be answered.

Mr. Allen:

Q. What in your opinion, on or about May 1, 1939, when you billed the Jeffcotts, constituted a reasonable charge for your services?

A. Twelve thousand five hundred dollars.

Q. Now, Dr. Donovan, at that time, as indicated by the correspondence in evidence here, you had had no information or communication or statement whatever from the defendants relative to their financial condition?

A. No, sir.

Q. And at that time, your knowledge concerning their finan- [139] cial condition consisted of that

(Testimony of Edward J. Donovan.)

which you had taken into consideration. Is that correct? A. Yes, sir.

Q. Now Dr. Donovan—May I have plaintiff's exhibit 1, I believe it is, or 2?—I hand you Plaintiff's Exhibit 2 in evidence and ask you to glance through it and refresh your memory as to the substance of that exhibit. I do not think you need to read it in full, doctor. From your examination of that, you recognize that, do you, as the letter which Mr. Jeffcott wrote after receiving your statement, in which he stated his financial condition?

A. Yes, sir.

Q. Now, I will ask you to state, Dr. Donovan, whether or not your opinion as to the reasonableness of your charge for your services in this case was changed in any wise by the advice contained in Plaintiff's Exhibit 2, relative to the condition, the financial condition, of Mr. and Mrs. Jeffcott, as they stated it to exist on May 22, 1939?

A. No, sir.

Q. In other words, had you been advised by the defendants prior to determining your charge and submitting your statement that their financial condition was as stated in that letter, Plaintiff's Exhibit 2 in evidence, your charge for the services performed would have been in like amount?

A. Yes, sir. [140]

Q. Now, Dr. Donovan, I believe you testified somewhat with reference to past experience of Dr. Downes, Dr. William A. Downes, in the perform-

(Testimony of Edward J. Donovan.)

ance of pediatric surgery or surgery involving infant cases. Will you state in detail your knowledge of the extent to which he devoted his practice in New York to pediatric surgery?

A. He had exactly the same, Dr. Downes had exactly the same positions that I have today in New York, and I stated that Dr. Downes was probably one of the first surgeons in this country who attempted to separate the surgery of infants and children from adult surgery. Dr. Downes was known all over the country as an excellent surgeon, as an authority on surgery, of a great many varieties, and as one of the pioneers in surgery of infancy. Dr. Downes also did adult surgery. He had the very same services that I have now, at Babies Hospital and St. Luke's Hospital, and Dr. Downes did about the same proportion of baby surgery that I stated I was doing yesterday, as I would think about fifty percent baby surgery and fifty percent adult surgery. Dr. Downes wrote a great many articles on pediatric surgery, reported a great many cases, and Dr. Downes and Dr. Boling did report the greatest number of operations on babies in certain groups of abdominal surgery. Dr. Downes reported operations for a great many unusual abdominal conditions in babies.

Q. Now, Dr. Donovan, are you acquainted with Carl G. Burdick, of New York? [141]

Mr. Robertson: I move to strike the testimony given by Dr. Donovan in reference to Dr. Downes,

(Testimony of Edward J. Donovan.)

because the only purpose it could serve would be to corroborate the depositions of the doctors, and the testimony at this time of building up these men is absolutely immaterial. Their own testimony as to their qualifications speaks for itself, and then if we attack them, perhaps Dr. Donovan can testify as to their positions.

The Court: It was occurring to me while the doctor was giving his testimony as to Dr. Downes, whether he collaborated with you in the pamphlet that was presented here this morning.

A. No, as I stated yesterday, he was the man under whom I trained.

The Court: I do not see the materiality of this testimony at this time.

Mr. Robertson: Is the motion granted?

The Court: Yes.

Mr. Allen: I think it is admissible evidence bearing on the qualifications and type of training this man has received, but [142] as to Dr. Burdick, I will consent to the propriety of the objection, but I believe the evidence is material as to Dr. Downes, in view of his connection with Dr. Donovan.

The Court: It might be if there were any record contradicting the qualifications.

Mr. Allen: If the court please, I am about to reach the conclusion of this witness' testimony, and would like at this time to ask if the court desires to interpose any examination as to any of the scientific aspects of the case, as well as any aspects of

(Testimony of Edward J. Donovan.)

the case. I have attempted to keep the scientific features of the case in as understandable language as possible, but I do not know whether or not there is any question in reference to the nature of this operation which the court would like to ask at this time.

The Court: No, I have followed it closely and with interest, and I think the court has a picture of what was necessary and what was done, so I have not anything in my mind at this time.

Mr. Allen: I ask the court's indulgence that I may retain this witness on direct until after the noon recess, as his testimony [143] is rather involved and detailed.

Thereupon the court recessed until two o'clock in the afternoon, at which time the trial was resumed.

Mr. Allen: The plaintiff is ready.

Mr. Robertson: Defendants are ready.

Mr. Allen:

Q. Dr. Donovan, what form of incision was made for the purpose of performing the operation on Baby Jeffcott?

A. What is called a right rectus incision, which means that you make the incision in the right rectus muscle, which is the large muscle which runs up either side of the mid-line of the abdomen. This means you incise that muscle and separate it.

Mr. Allen:

You may cross-examine.

(Testimony of Edward J. Donovan.)

Cross Examination

By Mr. Robertson:

Q. Dr. Donovan, do you really think that your time and services were worth six thousand dollars a day for the time you devoted to this case?

A. Mr. Robertson, I don't think the time enters into this [144] matter at all, as far as I am concerned.

Q. Do you think you were worth six thousand dollars a day in this particular instance?

A. Yes, I certainly do.

Q. And your gross earnings for that year, the year of 1939, amounted to forty thousand eight hundred and some dollars?

A. Yes, sir, that is cash.

Q. That is what you actually earned and received in 1939?

A. That is not necessarily what I earned. That means what I was paid for.

Q. You keep your books on a cash basis?

A. Yes, sir.

Q. You actually collected forty thousand eight hundred and some odd dollars that year?

A. Yes, sir.

Q. You billed Mr. Jeffcott approximately one-third of that amount for the time and work you did on this particular case?

A. I did, yes, sir.

Q. As I understand it, doctor, you were in Atlantic City at the time Dr. Thompson first communi-

(Testimony of Edward J. Donovan.)

cated with you? A. That is right.

Q. And you had planned to be away from your work and office and had made arrangements with another doctor to take care of your patients until Sunday night? A. That is right.

Q. And any emergencies that might come up? [145] A. Yes.

Q. When did you get back to New York after your trip to Tucson?

A. I got back to New York about, perhaps, three hours after I got into Newark. I landed in Newark, I would say, some time between ten and twelve o'clock.

Q. What time did you leave Tucson?

A. At eleven o'clock, but I had an entirely different type of plane than the one I came out on. I had a plane that I would think made at least twenty stops, as near as I could guess.

Q. You took the daylight flight that left Tucson at what time?

A. Roughly at eleven o'clock.

Q. That was your preference, in that you wanted to see the country? You preferred that flight instead of the Mercury flight that left here that evening?

A. I know nothing of the Mercury flight. I know nothing of it now. I could not get reservations on the evening plane.

Q. Did you attempt to get reservations?

A. I did.

(Testimony of Edward J. Donovan.)

Q. What time did you leave here?

A. About eleven o'clock, I think, before noon. I think it was roughly about eleven o'clock, as I remember.

Q. So you were back in New York approximately at noon on Tuesday?

A. I would say noon. I had to go from Newark to Inglewood. [146]

Q. The total lapsed time you were away from New York was roughly sixty to sixty-five hours? Saturday evening, Sunday, Monday, Tuesday?

A. About sixty hours, did you say?

Q. Yes. A. About that, yes, sir.

Q. You left Newark around six o'clock on Saturday evening? A. Six-ten.

Q. You had driven up from Atlantic City?

A. I came on the train.

Q. You had your dinner on board the plane?

A. I had my dinner. I do not know where I had it. Yes, I think probably I had dinner on the plane.

Q. The records of the American Airlines show you had good weather.

A. We left Newark in a pouring rain, and the radio beam out of Washington was out of commission and we had to go over the Alleghenys.

Q. You simply took the alternate route out of Washington?

A. Yes, but we left in a rainstorm, pouring rain.

Q. Would you attempt to qualify as an expert as to whether that was good or bad flying weather?

(Testimony of Edward J. Donovan.)

A. When we got to Pittsburgh there was ice on the windows, and I am sure there was ice on the wings. I know nothing about it.

Q. Have you been on a plane since?

A. No, never before nor since. [147]

Q. It was a sleeper plane and you arrived in Tucson at six o'clock?

A. Six-thirty, I believe.

Q. And Dr. Thompson met you at the airport?

A. That is right.

Q. And took you immediately to the Desert Sanatorium? A. Yes, sir.

Q. There you consulted with Dr. Thompson and Dr. Carrell. Was Dr. Tappan there?

A. I don't think she was there when we arrived. She was there later.

Q. You reached the decision that an operation was necessary and Dr. Carrell, I believe you said, made arrangements to get the necessary instruments you would need?

A. He asked first what I needed, and then got what I asked for.

Q. Did you see Mr. Jeffcott or Mrs. Jeffcott when you got there?

A. I saw Mr. Jeffcott, but I don't remember whether it was before or after the operation. I saw Mrs. Jeffcott after the operation.

Q. To refresh your recollection, is it not a fact that you saw Mrs. Jeffcott the first time immediately before the operation, while she was being bathed,

(Testimony of Edward J. Donovan.)

and dropped in again shortly after the operation?

A. I cannot say. I am not sure about before the operation. I certainly saw her afterwards. [148]

Q. Is it not a fact that the first time you saw Mr. Jeffcott was shortly after the operation?

A. He was standing in the hall or corridor, and I cannot say whether it was before or after the operation.

Q. And at that time the operation had been completed, and you were discussing the operation with Dr. Hugh Thompson, Dr. Tappan and Dr. Carrell, and perhaps Dr. Van Horn?

A. At that time?

Q. Yes.

A. I will tell you exactly what I did. I walked from the operating room, I think across the hall, which is the doctors' room, and took off my operating clothes, and there were a number of doctors there, and we did talk about it. Also on the trip I mentioned this morning that Dr. Carrell took me on, either before or after going to church, we passed Mr. Jeffcott in a car.

Q. He was on his way to the San?

A. I could not tell you, sir.

Q. After you decided an operation was necessary, you went to church and Dr. Carrell went to get the instruments you wanted, and you commenced the operation at approximately ten o'clock in the morning?

A. Yes, sir.

Q. Your operation took how long?

(Testimony of Edward J. Donovan.)

A. I cannot say exactly, but my estimation is that it took an hour.

Q. Roughly an hour?

A. Yes, roughly an hour. [149]

Q. That would be approximately eleven-thirty?

A. Yes, it takes a little while to get the patient ready. My feeling would be that the actual operation took about an hour.

Q. As soon as you were dressed again, after taking off your operating clothing, you dropped into the room where Mrs. Jeffcott was being kept, didn't you? A. Yes.

Q. And Mrs. Jeffcott and Mr. Jeffcott and Mrs. Carrell were in the room at the time? There were several people in the room?

A. I could not say as to that.

Q. You have no recollection of that?

A. No, I have not.

Q. And then you and Dr. Carrell left the Sanatorium? A. After lunch, I think.

Q. Did you have lunch at the Sanatorium?

A. Yes.

Q. Do you recall with whom you ate?

A. No, sir, I do not. I ate in the room that I think is set aside for the doctors.

Q. At any rate, you sat in company with the doctors?

A. No, sir, not necessarily.

Q. Wasn't Dr. Carrell with you all of the time?

A. I cannot say. Dr. Carrell invited me to play

(Testimony of Edward J. Donovan.)

golf with him that afternoon, but whether he had lunch with me I do not remember.

Q. You went out to the golf course? [150]

A. Yes, we played eighteen holes, and probably spent two and one-half hours there.

Q. Do you recall when you got back to the Sanatorium?

A. I don't think I do. I do not know where I had my dinner, probably at the hospital. I think I was back at the hospital probably between five and six o'clock.

Q. To refresh your recollection, is it not a fact you had your dinner with Dr. and Mrs. Thompson?

A. Yes, I did. I had forgotten.

Q. She had a few friends in and had dinner at her house?

A. No, I think we went out for it. Let me think about it for a moment. I think we went out for it. I don't think we had it at Thompson's house.

Q. Mr. Jeffcott was not on the party?

A. Not on the party?

Q. Yes. A. No, sir.

Q. And you came back to the San and spent the night at the San? A. Yes, that is right.

Q. Did you check the baby's chart, or see the infant when you came back to the San?

A. I did indeed.

Q. You spent the night and the next morning you again saw the baby and checked the charts?

A. Yes, sir.

(Testimony of Edward J. Donovan.)

Q. And decided you were leaving on the eleven o'clock [151] plane, or it was decided for you, that you were leaving on the eleven o'clock plane, instead of in the evening?

A. I think I decided that for myself.

Q. You were unable to get reservations on the evening plane?

A. I see what you mean now.

Q. Can you recall whether you announced to anyone, or whether it was circulated, that it was your original plan to leave on the plane Monday evening?

A. I do not know that I did.

Q. Would you say that Mr. Jeffcott's information was erroneous if it was his understanding you were leaving on the evening plane?

A. When I left, I had no idea when I was coming back—when I left Atlantic City, I had no idea when I was coming back, and I don't remember that, sir, whether previous to that time, at eleven o'clock in the morning, or some time that morning, I stated that I was going back on the evening plane. I do not remember that I said that, sir.

Q. And the next morning, just before you left to catch your plane, I believe you dropped into Mrs. Jeffcott's room? A. That is right.

Q. Do you recall that she said that her husband would be sorry not to have seen you before you left?

A. It is possible. I do not remember that.

Q. You don't remember that?

(Testimony of Edward J. Donovan.)

A. No, sir.

Q. When did you first attempt to secure your reservations on the plane, doctor? [152]

A. Back from here?

Q. Yes.

A. I cannot tell you, sir. I don't remember a thing about it. All I remember is, and I don't remember who told me that, whether the Desert Sanatorium, or whether I called myself, that I could not get a sleeper plane back. I do not remember really at all.

Q. But you did leave approximately eleven o'clock in the morning?

A. About eleven-thirty.

Q. And you understood that Mr. Jeffcott had had to go to the ranch?

A. I did not ask where Mr. Jeffcott was, and I do not know that I was told.

Q. You don't remember that Mrs. Jeffcott told you that? A. She may have.

Q. Therefore, Mr. Jeffcott had very little opportunity to speak to you concerning a matter which should be so private as the discussion of a fee?

A. I would not believe that at all.

Q. You were constantly with these doctors?

A. No, all Mr. Jeffcott has to do to see me, or anyone else, is to speak to me, and I will come out.

Q. Would you think it would be the proper thing to do? A. I believe it is.

Q. Would it have been all right for you to have seen him about your fee?

(Testimony of Edward J. Donovan.)

A. There is every reason why I should not. [153]

Q. Why not?

A. I don't believe it is my place to look him up about my fee or approach him in any way about my fee.

Q. Did you attempt to get into touch with Mr. Jeffcott himself to explain to him what was done, and what was wrong with the baby?

A. Will you please repeat that question.

The Reporter: (Reading)

Q. Did you attempt to get into touch with Mr. Jeffcott himself to explain to him what was done, and what was wrong with the baby?

A. No, sir.

Mr. Robertson:

Q. That is perhaps a customary thing for a person to do, is it not?

A. I told Mrs. Jeffcott. I don't think it was necessary to call Mr. Jeffcott and tell him. I certainly assumed he would hear it.

Q. There are no ethical restrictions about doing that?

A. There is an obligation on my part to do it. I told one prominent member of the family what was wrong with the baby, and what was done to correct that.

Q. How many times did you communicate with Dr. Thompson concerning this infant after you went back to New York?

A. I cannot tell you the exact number. I would be glad to try. [154]

(Testimony of Edward J. Donovan.)

Q. Do you have your records available?

A. Do I?

Q. Yes.

A. Mr. Allen has them.

Q. I wonder if you will consult with him and see exactly how many times you talked with Dr. Thompson on the telephone or communicated with him by means of telegram or letter?

Mr. Allen: There is all the material I have on the matter. (Handing papers to witness.)

A. These are six letters from Dr. Thompson to me. There is no record of telegrams or telephone messages.

Mr. Robertson:

Q. Now, do you have the letters you wrote to Dr. Thompson, or copies of them?

A. Whatever material I have is in Mr. Allen's hands. I cannot say.

Mr. Allen: Those six letters are all I have, Mr. Robertson.

Mr. Robertson:

Q. You have no record of any answers to these letters?

A. Whatever material I have was turned over to Mr. Schmidt and from Mr. Schmidt to Mr. Allen. [155]

Mr. Allen: That is all I have.

Mr. Robertson:

Q. Except for two instances when Dr. Thompson called you on the telephone, apparently that is the only time you ever responded to inquiries he made?

(Testimony of Edward J. Donovan.)

A. I am absolutely sure that is not so.

Q. What independent recollection have you that you have written to him?

A. I have no recollection that I think is pertinent on that question. Mrs. Jeffcott or Mr. Jeffcott asked if I would report to Dr. Hamblin, who is a doctor in New Jersey and related to Mr. or Mrs. Jeffcott, and every time I had any information about the progress of this baby, I reported to Dr. Hamblin each time.

Q. You did not communicate with Dr. Thompson except two times by telephone?

A. I communicated with Dr. Thompson a great number of times.

Q. By letter?

A. I would say very truthfully and very accurately that I had a very close contact with this case.

Q. You would say Dr. Thompson sent you these reports? A. Yes.

Q. But you cannot say you sent letters or telegrams in response to those letters?

A. I know I did, but I cannot prove it.

Q. How much time would they consume? [156]

A. You mean to write the letters?

Q. In responding to his reports.

A. Not very much time; very little time.

Q. Did you talk to any member of the family other than the brief introduction you had to Mrs. Jeffcott before you performed the operation?

(Testimony of Edward J. Donovan.)

A. No, sir.

Q. Had you found out anything about the financial condition of the parties before you performed the operation?

A. No, sir.

Q. Did you know anything about the grandparents?

A. No, sir.

Q. And, in fact, you did not know that this was the sole grandson until after the operation was performed?

A. Before I performed the operation?

Q. Yes.

A. No, sir, I did not. Excuse me just a moment. May I correct that. I will change that a little bit. Someone mentioned that fact during the consultation, but who it was, I cannot say.

Q. But that did not weigh down very heavily upon your mind in the responsibility you felt for the child?

A. I would feel the same responsibility if I were going to operate on a child, whether he were the first or the tenth.

Q. I appreciate your honesty, doctor. Therefore, that part of the responsibility constitutes no part of the foundation for your charge, whether he is the sole grandson, [157] and his grandparents are worth a million or a thousand or nothing?

A. No, sir; no, sir.

Q. How much would you have charged for this operation, doctor, had it been performed in New York City?

(Testimony of Edward J. Donovan.)

A. Well, I cannot say exactly. I would have proceeded just as I stated this morning. If Mr. Jeffcott had spoken to me about it beforehand, or Mrs. Jeffcott, or anyone, I would have been very glad to talk the situation over with them, and if Mr. Jeffcott had put the baby in my care, I would have proceeded exactly as I stated this morning. For semi-private, I would have charged so much; if in a small private room, I would have charged so much; if it were in a large private room, I would have charged more. I would have proceeded just as I stated this morning.

Mr. Robertson: I submit, your Honor, that that question can be answered in a more definite way, and I insist that Dr. Donovan do so.

Mr. Allen: I submit, your Honor, that that question constitutes improper cross-examination.

A. It was not performed in New York. [158]

The Court: The witness is testifying as to the circumstances, but the witness can answer as near as you can what the charge would have been in New York. If the circumstances were different, you may answer accordingly. Has that been made clear to you, doctor?

A. Yes, sir.

The Court: All right, go ahead.

A. I would say I would have charged, oh, somewhere between thirty-five hundred dollars and five thousand dollars.

(Testimony of Edward J. Donovan.)

Mr. Robertson:

Q. Between thirty-five hundred and five thousand dollars? A. Yes.

Q. That is a span of fifteen hundred dollars, doctor? A. Yes.

Q. Your charges are very elastic, aren't they?

A. I don't think so.

Q. Doesn't fifteen hundred dollars mean very much to you?

A. It means a whole lot, of course.

Q. How can you just say you would have charged thirty-five hundred to five thousand dollars?

A. That would have depended entirely upon the hospital accommodations and moneys spent on the baby in the hospital. That is oftentimes the only way in which I have to distinguish between two parties, as to what they should be charged—[159] ed.

Q. So you would have charged, taking an average, four to five thousand dollars for that operation in New York. That takes care of your schooling, your professional standing, the responsibility assumed, the knowledge of what other surgeons would charge for the same operation, or similar operations—I think that you injected that into your answer this morning—and leaves only how much it interfered with your other duties and the financial condition of the patient to justify the difference between four thousand dollars and five thousand two hundred dollars, and a total of twelve thousand five hundred dollars. Now, doctor, taking those

(Testimony of Edward J. Donovan.)

items in the order I have named them, how much of that would you figure for interference with your other duties?

Mr. Allen: I object to the form of the question, your Honor, on the ground it is an argumentative form of question, and not proper cross-examination.

Mr. Robertson: I submit this is a very intelligible question, and he knows what I am getting at. I want him to justify the difference between thirty-five hundred to four thousand dollars, and twelve thousand five hundred dollars, whether it is for taking a trip by airplane, being away from his office, or what makes up that difference. [160]

The Court: Go ahead.

Mr. Robertson:

Q. How much of that difference, doctor—let us take a fee of four thousand two hundred and fifty dollars, so there won't be any quibbling—we have a difference of eight thousand two hundred and fifty dollars that you charged for making the trip from New York to Arizona. What part of that do you attribute to the hazards of the flight?

A. To the hazards of the flight I attribute a good deal of it.

Q. All right. How much?

A. Oh, certainly five thousand dollars.

Q. So you charged five thousand dollars for making a flight from New York to Tucson and return?

A. I did not say that.

Q. You attribute five thousand dollars of your fee to the hazards of the flight?

(Testimony of Edward J. Donovan.)

A. To me, yes, sir.

Q. Were you, by any chance, aware of the exact figures, or the approximate figures, of the American Airline, that up that time they had had six hundred and fifty million passenger miles without any fatality of any kind?

A. Yes, I had seen that, but that meant nothing to me at all.

Q. Didn't give you any feeling of security?

A. Not the least bit.

Q. Are you aware of the fact that accident statistics show [161] that travel in an airplane in 1939 was considerably safer than travel by automobile?

A. That means nothing to me. This was my risk. If a man as good as Wiley Post can get killed flying, so can I.

Q. When your number is up, you will be called?

A. I do not know what you mean by that.

Q. I will withdraw the remark. So that five thousand dollars of this additional eight thousand two hundred and fifty dollars, you figured in because of the hazards of the flight. You had already made arrangements to be away from your office up until Sunday night or Monday morning, so, as far as you know, there was no loss of business in that time?

A. That does not mean I might not lose something.

Q. Do you know of any single piece of business you lost in that time?

(Testimony of Edward J. Donovan.)

A. I have no way to find out.

Q. You have an office in New York?

A. I do indeed.

Q. Can you state whether any attempt was made to reach you at your office or at your home?

A. I could not say three years later.

Q. But you do have a pretty good recollection?

A. I might be away from my office ten hours and lose three cases. It has happened to me in less time than that.

Q. You might have, but do you know of a single piece of business you lost?

A. My reply is that I cannot state that. [162]

Q. Who was the other doctor with whom you arranged to take care of your patients while you were away?

A. The doctor who was there then is a doctor who was with me in the office for about five years previous to this time, or perhaps a year previous to that time. He is a man who had been associated with me in my old office.

Q. Who is? A. Dr. Heeks.

Q. Did he make any charge for taking care of your patients while you were away?

A. I don't know.

Q. It is not customary, is it, doctor?

Mr. Allen: I object to his answering that question.

A. I have to pay someone for everything that is done. If I go away, I not only lose the patients, but pay for what work is being done for me.

(Testimony of Edward J. Donovan.)

Mr. Robertson: This is a court of law, and it is incumbent upon you to justify a charge of three thousand two hundred and fifty dollars to cover loss of business. I am giving you an opportunity to do that, and you have not done it.

Mr. Allen: I object to his arguing with the witness.

The Court: Proceed. [163]

Mr. Robertson:

Q. I was explaining to the witness why I insist he can tell us how much he paid this doctor for the work he did while you were away from the office?

A. I cannot answer.

Q. Do you have a recollection of paying him anything?

A. Oh, yes, during the course of the year Dr. Heeks has done other work for me, but I do not remember what it was.

Q. Do you pay him by the month?

A. No, I would pay him for what he did for me each six months, or something like that.

Q. How does he bill you, doctor? How does he bill you?

A. I think he has put in a bill, but I am more apt to send it to him without a bill.

Q. Do you make him a donation, or send him a present, or something of that nature?

A. No. I would have a statement of what work he had done for me, probably, either oral or written, an account of what he had done for me, and I would

(Testimony of Edward J. Donovan.)

try to pay him for it, following no specific or settled rate, but what I thought it was worth.

Q. In summing up this part, doctor, you cannot tell us of any specific piece of business you lost by being out of your office on Monday?

Mr. Allen: I object to the question as having been asked and answered. [164]

The Court: Go ahead.

Mr. Robertson:

Q. You cannot give us any definite evidence of a single piece of business you lost, or evidence of anything you paid Dr. Heeks for anything he did for you while you were out of town?

Mr. Allen: I object to that question as assuming an untrue state of facts. The witness has given evidence, has testified on direct, what the situation is, and this question assumes a situation not in evidence.

The Court: Answer the question.

A. I cannot furnish such proof, no sir.

Mr. Robertson:

Q. While here? A. Today.

Q. This is the trial of the case, and it is now that I am asking the question.

Mr. Allen: Object to that as being facetious and immaterial.

The Court: The objection is good. [165]

Mr. Robertson:

Q. So far as three thousand two hundred and fifty dollars of that fee is concerned, you cannot

(Testimony of Edward J. Donovan.)

furnish any definite evidence of loss of business, to justify including that as a part of your charge against the Jeffcotts, can you?

A. May I ask a question?

Q. Yes, go ahead.

A. Will you mind telling me how you arrived at this three thousand two hundred and fifty dollars?

Q. You testified that had this operation been in New York, and you had found the patient in the same condition you found this patient, and the parents, your charge would have been between thirty-five hundred and five thousand dollars; so I told you that to simplify the matter, I would take a fee of four thousand two hundred and fifty dollars, which would have been the probable charge you would have made in New York City. Then you said it was worth five thousand dollars to make the flight from New York to Tucson, so that absorbs five thousand dollars of the amount of difference between the amount you would have charged a party in New York, and what you charged the Jeffcotts. So we have three thousand two hundred and fifty dollars to be absorbed by the loss of time, interruption of your duties, and so forth.

A. May I ask another question about it?

Q. Yes.

A. Why am I not allowed five thousand dollars for that fee? [166] This is all on the supposition that the baby went to New York?

(Testimony of Edward J. Donovan.)

Q. Yes.

A. Why am I not allowed five thousand dollars right there? Suppose the baby had a great big room and had four nurses, and there was no evidence, so far as I could see, of any attempt to cut down expenses, and suppose no one had said anything about expenses to me, why should I not be allowed the upper figure stated there?

Q. All right, I will give you the upper figure. Now, you have no evidence to justify the twenty-five hundred dollars difference, have you?

Mr. Allen: Same objection, that the questions are not capable of intelligent answer. Object to the form of the question. The proper form of cross-examination would be "Why."

Mr. Robertson: The record shows he has no evidence to justify that.

Mr. Allen: If he wants to know how he justifies it, all right, but not to assume something wholly improper.

The Court: Doctor, you may explain the different elements that you considered in determining you were entitled, as reasonable compensation for the operation, the amount you claim here. In other words, what your fee is based on. [167]

Mr. Robertson: The witness has done that and this is cross-examination, and I am asking the question to find how he would justify his fee of five thousand dollars, if the operation were performed in New York, because he has admitted there was

(Testimony of Edward J. Donovan.)

at least seventy-five hundred dollars charged solely because the operation was in Tucson instead of New York.

The Court: Doctor, do you want to make any further explanation in arriving at the different items? You may do so, if you desire.

A. Your Honor, it is difficult for me to make an intelligent answer. It was not done in New York. How could I make an intelligent answer to such a thing? It was not done in New York. I have to stop and think about it. Why should I be expected to answer that? It was not done in New York at all. How can I tell you how much I put to this and to that and the other thing? It was not done there at all. I admit I cannot answer it intelligently. It was not done there. I do not see why I have to answer it. Excuse me.

Mr. Robertson: We fail to see why Mr. and Mrs. Jeffcott should pay twelve thousand five hundred dollars and that is why we are trying to get the doctor's explanation. [168]

Mr. Allen: There is a question before the court, and an objection to it, and I think possibly a ruling on it at this time might clear up this situation we have run into.

The Court: The witness now is under cross-examination at this time, and a pretty wide latitude is accorded the opposing counsel to go into the elements of the total amount.

Mr. Allen: Counsel is asking the witness a question? He says you are unable to produce evidence,

(Testimony of Edward J. Donovan.)

not asking how he justifies this, why he charged it, but assumes a conclusion that is untrue. I object to the form of the question as improper. I am not attempting to curtail it or stop it or end it, and feel they are entitled to it. I object purely to the form of the question. I think if the counsel will ask within the proper realm of cross-examination how he justifies this or that, it would be proper.

Mr. Robertson: I would prefer to formulate my questions the way I want to, and the witness has already testified that he made previous arrangements to be out of New York until Sunday night, or to be back in his office Monday morning, and he has not been able to show that he lost any business by being out of the office until Tuesday, and he cannot show that he paid Dr. Heeks anything. [169]

Mr. Allen: That is a false statement, and that is the heart of my objection to the question now before the court.

The Court: Objection sustained.

Mr. Robertson:

Q. Now, doctor, let us take the base charge you would charge for these services in New York——

A. The base charge?

Q. The charge you said you would have made had the patient been in New York. May I complete my question? You did state you would have charged between thirty-five hundred and five thousand dollars for this operation, if it had been performed in New York?

(Testimony of Edward J. Donovan.)

A. Provided certain things.

Q. What were those certain things?

A. Provided—I said provided the patient had certain attentions, had a nurse or two nurses, or had a certain kind of a room, had certain kind of attention from me—there are a good many things entering into that.

Q. I assume that what you mean to say is that had you walked in and found the conditions the same in the hospital in New York as you found at the Desert Sanatorium as to room and nurse, that you would have charged thirty-five hundred to five thousand dollars.

A. Mr. Robertson, may I ask a question about that? [170]

Q. Yes, sir.

A. I stated that the condition of the patient was one of my first considerations in fixing my fee. I have a perfect right, with this kind of questioning to suppose that this baby might have been in an entirely different condition had I seen him in New York, haven't I?

Q. No, doctor, because I said that suppose all other conditions were the same except you performed the operation in New York rather than in Tucson, which necessitated your being away from your office two days.

Mr. Allen: I refer to the record on that statement. It is not part of the original question, and I think it would be well that the colloquy between

(Testimony of Edward J. Donovan.)

the witness and counsel be limited to question and answer.

Mr. Robertson: Despite the fact I may be vigorously defending this action for my client, I am trying to extend the doctor the courtesies of one professional man to another.

The Court: It should be confined to questions and answers.

Mr. Robertson: I would suggest that the court inform Dr. Donovan that any time he has a question to ask me, he address your Honor, and then the court can ask me. [171]

Mr. Allen: That will be very satisfactory.

Mr. Robertson:

Q. Then, doctor, was it your intention to testify that you would have charged between thirty-five hundred and five thousand dollars, had the other conditions been the same, the condition of the patient, the appearance of the parents, the size of the room, the number of nurses, and everything else that went into it, except your trip from New York to Tucson and back?

A. No, sir, I had given that no consideration at all. It was not done in New York.

Mr. Robertson: If the Court please, I would like to have Mrs. Burges go back and give us the question and answer where he stated the basis upon which he determined his fee.

The Court: Is the question clear to you, doctor?

The Witness: I think this is another question, sir. I think this is another question.

(Testimony of Edward J. Donovan.)

Mr. Robertson:

Q. On that basis, doctor, what would your charge have been?

A. May I have the question reread, sir?

The Court: Very well. [172]

The Reporter: (Reading)

Q. Then, doctor, was it your intention to testify that you would have charged between thirty-five hundred and five thousand dollars, had the other conditions been the same, the condition of the patient, the appearance of the parents, the size of the room, the number of nurses, and everything else that went into it, except your trip from New York to Tucson and back?

A. I had not so intended.

Mr. Robertson:

Q. Very well, doctor, assuming that all circumstances, condition of the child and the financial appearance of the parents, had been the same in New York, what would your charge have been?

A. I would say about five thousand dollars.

Q. And then, doctor, after making such a charge of five thousand dollars, had you found that the appearance or appearances, as you termed them this morning, were not a true representation of the financial condition of the parties, that the nurses had been ordered on the case by the attending physician, as Dr. Thompson testified yesterday he ordered them, and that the parents had a gross annual income of eight thousand dollars, with op-

(Testimony of Edward J. Donovan.)

erating expenses during that particular year of eleven thousand dollars, would your fee have been the same? A. In New York or Tucson?

Q. In New York. [173]

A. Yes, sir.

Q. Why then, doctor, do you say you take into consideration the financial condition of the parents of the baby?

A. I do, but it is only one element. That is only one of them, and I have stated them so far as I can.

Q. You stated that where the patient or the one responsible for the payment of the fee seemed to be in comfortable circumstances, by having a large room, two nurses, working twenty-four hours a day, and the fact that there was no appearance at any time of worrying over expense, that your charge would be based upon that. Then if you find out that these people are not in comfortable circumstances, would you change your mind?

A. Of course I would change my mind, if they talked it over with me.

Q. So, had the operation been in New York, and had Mr. Jeffcott come in afterwards and made the explanation as he did in the letter he wrote you, would you have changed your mind?

A. I would be very glad to talk it over with him and do the best I could about it. I have no desire whatever to overcharge any patient, sir, and I can prove that.

Q. Suppose you talked it over with him, and he had revealed his financial circumstances, that five

(Testimony of Edward J. Donovan.)

thousand dollar charge you originally made was a charge you would have made to someone in comfortable circumstances? A. Yes, sir.

Q. The same as this twelve thousand five hundred dollar [174] charge was made?

A. Yes, I would think that, in a fair way, corresponds to a five thousand dollar charge.

Q. Yes, and then if it developed that they were a couple of young people, attempting to get started in the world, that every cent they had was in a cattle ranch that was mortgaged for a good one-third to one-half of its value, that their expenses exceeded their income by several thousand dollars, would you not reduce your bill?

A. Not if they had told me that the value of that ranch was one hundred and fifty thousand dollars.

Q. Subject to a mortgage in excess of fifty thousand dollars?

A. Yes, that is a lot of money, yes, sir.

Q. Yes, a lot of money, and twelve thousand five hundred is a big fee? A. Yes.

Q. It represents a third of your income for that year?

A. Yes, that is the only trip I ever took, six thousand miles away, in that year. Remember that, sir.

Q. The rest of the time, how did you get from your home in New Jersey to your office in New York?

(Testimony of Edward J. Donovan.)

Mr. Allen: I object to that as having no bearing on this case.

The Court: What is the purpose of the question?

Mr. Robertson: That he subjects himself to hazards and inconvenience [175] that may be equal to taking an airplane trip from New York to Tucson.

The Court: I think that is too remote. Objection sustained.

Mr. Robertson:

Q. Then you say you took into consideration the financial ability to pay? A. Yes.

Q. You know, do you not, that the majority of physicians and surgeons in this country, and particularly surgeons, have in major surgical operations been using in their determination of a fee, that principle of giving consideration to the ability of the patient to pay, one of two tests. They often take one month's salary or one-tenth of the annual net income.

A. I would not agree to that.

Q. Have you ever heard of that practice?

A. I have heard of a great many things like that, but I can't say I ever heard of that.

Q. Give us a few more. What are some of the yard-sticks?

A. It depends a good deal upon the operation. Suppose that any surgeon, a brain surgeon, a nose and throat man, or something like that, does an operation that involves a good deal of risk; or take

(Testimony of Edward J. Donovan.)

myself, if you wish me to, takes a good deal of risk in operating upon a patient who is desperately ill—lots of men of that type— [176] not necessarily that type—lots of men of that prominence, who are considered specialists, will insist upon a patient putting a fee, which is very likely to be a big fee, on the line or in the bank, before they touch that patient.

Q. How big a fee, doctor?

A. Good big ones, Mr. Robertson.

Q. In what proportion of a man's income?

A. I can name some fees, if you would like me to.

Q. I would like to ask you whether you know that it is a fact that Mayo Clinic, Johns Hopkins, Scripps Clinic at La Jolla, all operate on the basis they take ten per cent of a person's annual income, and consider in that the travel expenses of the patient from his home to the clinic?

Mr. Allen: I object to that as wholly immaterial. Dr. Donovan is not the Mayo Clinic or any other clinic. He is an eminent, highly qualified specialized surgeon, and it is immaterial what the Mayo Clinic or Johns Hopkins or Scripps charge. They are operated on a wholly different basis, and the question here is the custom or usage of surgeons who compare with Dr. Donovan.

Mr. Robertson:

I withdraw the question for a moment.

Q. Is it not a fact that you will find surgeons who possess a standing practically equal to yours, if not equal, in [177] all of those institutions?

(Testimony of Edward J. Donovan.)

A. I do not know about the Scripps.

Q. The Scripps-Howard.

A. I would certainly say that in the Mayo Clinic there are certainly surgeons that compare with anyone, even myself.

Q. Do you know about Johns Hopkins?

A. I know nothing about that.

Q. Do you know about——

A. I know who is the professor of surgery there, and that is all I know.

Q. I ask you if you do not know yourself that at least the Mayo Clinic charges fees based on the percentage of annual income I mentioned, deducting the travelling expenses of the patient from their home and return?

Mr. Allen: That constitutes improper cross-examination.

The Court: The question may be answered.

A. Mr. Robertson, with all due respect, I have a feeling that that is not true, not saying that I doubt your word, sir. I have a feeling that is not so. If you wish me to, I can develop that a little more.

Mr. Robertson:

Q. I asked you if you did not know yourself. If you do not know, your answer can be "No". [178]

A. If I do not know they do that?

Q. Yes.

A. My answer is no.

Mr. Robertson: I state to the court my information is that that fee is charged.

(Testimony of Edward J. Donovan.)

Mr. Allen: Object to the testimony of the counsel, unless he is put on the stand.

Mr. Robertson:

Q. Then, doctor, you do not have any definite way that you take into consideration the ability of the patient to pay, do you?

A. Yes, I do, Mr. Robertson.

Q. All right. Let us have it.

A. I do not mean to say that I have any plan at all, any percentage basis, or anything like that. I very frankly admit I have not, sir. My plan is that I will—I have perhaps five times in the last year, or the last two years, investigated the finances of a patient, and by that I mean that I have employed a credit bureau, for example, who will give you a report on that patient. I have not usually investigated the financial condition of patients, and by investigation I mean, gone into them very thoroughly like a report from a credit bureau. I have had no trouble in sitting down and working out [179] a price, agreeable to their finances, without me investigating their finances.

Q. You did not accomplish that in this particular case.

A. I did not have a chance to talk it over.

Q. Mr. Jeffcott did not have an opportunity to talk with you.

A. He certainly did.

Q. Could he have talked to you at the golf course?

A. Yes, I was available.

Q. Could he have talked with you while you were having dinner with the Thompsons?

(Testimony of Edward J. Donovan.)

A. He could have.

Q. You know that decent white men do not take up business matters at such times as that.

A. I think if a man is worried about something, he will talk it over any time, day or night.

Q. Let us talk about something to worry about. You said this morning, in fairness to Mr. and Mrs. Jeffcott, as the parents of the baby, is it not a fact whether or not that infant was going to survive for a number of weeks after that operation, not as a result of the operation, any neglect on your part, or anything like that, but due to the seriousness of the operation, is it not a fact that that baby's life was hanging by a hair for a considerable period of time after that operation? A. Yes.

Q. Is it not natural that any young mother and father are going to be seriously concerned over that condition? [180] A. Yes, I think so.

Q. And is it not natural, that Mr. and Mrs. Jeffcott, when they knew you were very much occupied with the other doctors, which is a natural thing for a professional man, should have refrained from forcing themselves upon you to talk about finances?

A. No, sir, I was not occupied with the other doctors, as you have stated.

Q. I do not mean by that that you closeted yourself with them, but you spent the greater part of your time with them.

A. I was available to anyone. I might have spent my time with anyone else.

(Testimony of Edward J. Donovan.)

Q. Has it occurred to you that Mr. Jeffcott might have placed utter confidence in the fact that you would, when he had explained the matter by correspondence, charge a reasonable fee?

A. No, sir.

Q. It has not occurred to you?

A. That he might arrange it?

Q. That he had utter confidence in the fact that you would be fair, and that he would have no difficulty in arranging a reasonable and satisfactory fee?

A. I am sure he had that confidence.

Q. So, was it so unusual for the boy to spend his time with his wife and worrying about his baby, rather than taking you away to talk to you about finances? [181]

A. He did not have to take me away at all to talk to me about it. He had lots of opportunities to talk with me about it, a matter of a minute, or two minutes or three minutes. No matter where I was, I was available.

Q. This statement came before the baby left the hospital? You mailed it May first, and the baby stayed in the hospital six weeks?

A. Yes, sir.

Q. Had he taken you aside and explained his finances to you, would your charge have been the same?

A. Yes, sir, in a large measure, yes, sir.

Q. Then, as I view it, at least at the time of this operation, you would walk into a private institution

(Testimony of Edward J. Donovan.)

and see a patient, and the only thing you would do in taking into consideration their ability to pay would be to consider their surroundings, their appearances, whether or not they had a nurse or a fancy bed-jacket or fancy haircut, or anything else that goes into appearances, determine upon that their financial ability to pay?

A. No, sir, not in one day. Are you speaking now of at home?

Q. Yes.

A. I would not just walk in and see what kind of a bed-jacket the patient had on. It depended upon several things. I have often determined my fee upon what the patient spent upon other things in the hospital, that means, did they have a great big room, a good room; did they stay two or three weeks; did they get out as quickly as they could; [182] did they keep their nurse all the time, when it was not necessary; did they show me during that time evidence that they were trying, or did they say to me during that time "Let's keep this down as low as we can"—any remark of that kind. Did they show me at that time they were making an effort to keep their expenses down. This is not a one day's decision. I did not say that I would walk into a room and look at a bed-jacket, or whatever you said, and say how much I would charge.

Q. But that is in a case where you are the surgeon and the one who takes care of the major part of the post-operative care?

(Testimony of Edward J. Donovan.)

A. Yes, I cannot help but see them.

Q. And the appearances of the two nurses, large room, and anything else you take into consideration, you would not take that as a snap-shot of their financial condition?

A. It made no impression upon me at all, none whatever. All I had been told previous to my coming was that expenses were no item, or whatever it was, and I merely related that I saw the nurses. Mr. Robertson, I would not mind if the Jeffcotts had ten nurses taking care of this baby. I have been called six thousand miles to see the baby. The fact they have four nurses, have the baby in a large room, those things are not going to make a bit of difference. I have been told before I came, money is no object. I had a right to charge a good fee for the job I did. The nurses, the size of the room, are minor details and [183] merely verified the fact that expenses were not worried about.

Q. Now, doctor, you have heard the testimony of Mr. Jeffcott and Dr. Thompson, of how the expression of "Money is no item" was ever conveyed to your ears. In the first instance, Dr. Thompson asked Mr. Jeffcott as to whether or not money is any object. He testifies that Mr. Jeffcott said "No". Mr. Jeffcott testified he said "Nothing in reason", and if it would not cost any more for the doctor to come out here than to take the doctor and nurse and baby back to New York, and admitting that it is very unfortunate that such a misunder-

(Testimony of Edward J. Donovan.)

standing took place, you must admit that that expression is a very elastic one.

A. It is elastic, yes.

Q. And to a person earning two or three thousand dollars a year to say "Money is no object", is one thing, but when we earn fifty thousand a year, it is entirely different.

A. No, sir, I think a man who is earning two or three thousand dollars a year cannot say "Money is no object". Money means something to anyone. I am earning more than that, and I cannot say it.

Q. Do you think that where a patient says that to you, that you are entitled to charge that patient a fee that you would charge to anyone with a very high income?

A. It means to me, I am entitled to charge a very good fee for coming out here, and it might have been, too, a [184] factor to induce me to come out here.

Q. It might have been?

A. It might have been. How do I know?

Q. Would you have refused to come out here if Dr. Thompson had told you the Jeffcotts were unable to pay you more than twenty-five hundred dollars?

A. Yes, sir, as I have stated before in my interrogatory——

Mr. Robertson: If the court please, every time I ask a question, he elaborates on it considerably and I don't think it is necessary.

(Testimony of Edward J. Donovan.)

The Court: The doctor has answered. We will take a fifteen minute recess at this time.

At 3:50 p. m., the trial was resumed.

Mr. Robertson: May we have that last question, Mrs. Burges?

The Reporter: (Reading)

Q. Would you have refused to come out here if Dr. Thompson had told you the Jeffcotts were unable to pay you more than twenty-five hundred dollars?

A. Yes, sir, as I have stated before in my interrogatory——

Mr. Robertson: I move to strike that answer, "as I have stated before". [185]

The Court: All right.

Mr. Robertson:

Q. So you do not consider, doctor, that a thousand dollars a day, plus five hundred dollars for your expenses, would have constituted reasonable compensation for you? A. No, sir.

Q. By the way, how much were your expenses?

A. Roughly three hundred to three hundred and fifty dollars. I am really not absolutely sure what the airplane cost, but it was about that, and there were no other expenses much. I had my meals at the Sanatorium and stayed at the Sanatorium. I would say my expenses were roughly three hundred, or perhaps three hundred and fifty dollars.

Q. I believe you testified this morning the condition of that baby was extremely critical?

(Testimony of Edward J. Donovan.)

A. Extremely critical?

Q. Yes, sir. A. Yes.

Q. Do you think that baby would have survived an airplane trip, doctor?

A. I could not say. I do not think it would have done a baby any good to have traveled three thousand miles by plane.

Q. When Dr. Thompson called you, if he had told you that Mr. Jeffcott could only pay you two thousand dollars, or [186] twenty-one hundred and fifty dollars, plus your expenses, after explaining the condition of the baby as he did, would you have refused to come? A. Yes, sir.

Q. What then, doctor, would have been the alternative?

A. They could have gotten some of the Tucson men to operate on the baby.

Q. Do you think someone in Tucson could have successfully performed the operation?

A. I could not say. I do not know about the people in Tucson. I have a man who could have performed an operation successfully on a baby eight days old. I do not know what the men in Tucson can do.

Q. That is exactly why you were called.

A. What?

Q. Because it was the operation for a specialist to do.

A. Yes, sir, that is a real operation.

Q. Now, doctor, you have been in the practice of medicine for yourself for how many years?

(Testimony of Edward J. Donovan.)

A. Well, I was licensed in 1921, and was practicing all of that time in the hospital. For myself, I started to practice in 1923.

Q. So in 1939 you had been practicing roughly sixteen years for yourself? A. Yes, sir.

Q. Don't you feel, doctor, that not being under the stress of worry over the health and the very critical condition [187] of your infant child, and being a professional man and being called in connection with professional services, that it was more incumbent upon you to ascertain exactly what could be paid, and what the financial circumstances of the parents were, than it was the duty of the parents of this infant child? A. No, sir.

Q. And you were perfectly willing to take that very indirect statement that the cost was no item, or expense was no item, and come out here, without asking any questions at all as to what was meant by that term?

A. I had no reason to ask what that term means. That term really means something.

Q. Hadn't your experience taught you you should inquire? A. No, sir.

Q. Now, the nature of the operation, or the condition of the baby, was explained to you in general by Dr. Thompson? A. Yes, sir.

Q. As I understand it, prior to this operation, you had performed eighteen similar operations?

A. Yes, sir.

Q. Would you say that the condition of this child was equally grave, more so, or less?

(Testimony of Edward J. Donovan.)

A. I would say that in many instances it was worse, the condition of those babies was worse.

Q. As I understand it, for those eighteen operations, you have charged nothing for fourteen? [188]

A. That is right.

Q. You charged one thousand dollars for one?

A. Yes, sir.

Q. You charged twenty-five hundred dollars for another? A. Yes, sir.

Q. Three hundred dollars for another?

A. Yes, sir.

Q. And two hundred and fifty dollars for the other?

A. I don't think I was paid for that many. As a matter of fact, there were only four that paid anything. Didn't you mention five?

Q. You have listed here, one for twenty-five hundred dollars? A. Yes, sir.

Q. One for three hundred and fifty dollars?

A. Yes, sir.

Q. And one for two hundred and fifty dollars?

A. Yes, sir.

Q. And one for one thousand dollars?

A. Yes, that is five. Twenty-five hundred, one thousand, three hundred and fifty, and two hundred and fifty. That is four. I think that is right.

Q. Now, what were the financial circumstances of the patient who paid you twenty-five hundred dollars?

Mr. Allen: Just a moment. I wish to interpose

(Testimony of Edward J. Donovan.)

another objection. It is improper cross-examination, your Honor. The law is that what a physician charges another patient is no [189] element bearing upon reasonableness of a charge in a particular case; consequently the examination is improper in this case. I want to cite a decision and read a quotation from it, your Honor. I believe that statement is in Jones on Evidence, your Honor.

The Court: Was that one of the interrogatories that was propounded and the court ruled upon?

Mr. Allen: Yes, your Honor. Interrogatories are not subject to admission in evidence. They are for discovery of counsel. There is a case or cases that hold directly that what a physician may have charged in another case is incompetent evidence as having no bearing upon the issue of the reasonableness of the charge in the case before the court. The objection that I make at this time is that what might have been charged in other cases, or the elements going into those cases, are all immaterial as to the determination of the case. The issue before the court is what is the reasonable value of the services performed, and what might have been the reasonable value of some other service does not tend to prove or disprove that issue. The court can readily see that, and the cases are multitudinous along that line, such as the case of *In Re Walkers Estate*—— [190]

The Court: I sustain the objection.

Mr. Robertson: If the Court please, it is the best

(Testimony of Edward J. Donovan.)

yard-stick in the world in determining what this man charges for his services. I am confident that if there is such a decision as Mr. Allen speaks of that it is the old line of argument that any testimony of the doctor or patient is inadmissible, but the courts, even in Missouri, have gone so far as to allow the admission of the testimony of the doctor as to what he charged in other cases.

Mr. Allen: Your Honor, I cite 21 Ruling Case Law, p. 45; 48 C. J., p. 1166, and *Citron v. Fields*. As to the reasonable value of services, the court held that other acts of service throw no light upon that. What the doctor might do in other cases might have a bearing upon his reputation, but the amount of fees in other cases is an improper measure. It throws no light upon the issues in this case. They cannot be related to it. They throw no light on it. They are merely isolated instances and do not constitute a practice which has any bearing upon this particular case. They are under different circumstances. If the counsel could prove an identical case, it might have some bearing, but they are not permitted to examine at random about other cases. [191]

The Court: Your inquiry is what were the financial circumstances of the party against whom the doctor made a charge in that particular case?

Mr. Robertson: Yes, sir.

The Court: I sustain the objection.

(Testimony of Edward J. Donovan.)

Mr. Robertson:

Q. Doctor, what were the circumstances, including all of the elements which you took into consideration in making a charge in connection with the fee of twenty-five hundred dollars, which you received from a similar operation?

Mr. Allen: Same objection.

The Court: Same ruling.

Mr. Robertson:

Q. What were the same conditions and circumstances, doctor, under which you received a fee of one thousand dollars for a similar operation?

Mr. Allen: Same objection.

The Court: Same ruling. [192]

Mr. Robertson:

Q. And what were the circumstances and conditions under which you received a fee of three hundred dollars for performing a similar operation?

Mr. Allen: Same objection.

The Court: Same ruling.

Mr. Robertson:

Q. What were the conditions and circumstances under which you received a fee of two hundred and fifty dollars?

Mr. Allen: Same objection.

The Court: Same ruling.

Mr. Robertson:

Q. Why is it, doctor, there is so much variance in the charges you make?

Mr. Allen: Same objection.

The Court: Same ruling. [193]

(Testimony of Edward J. Donovan.)

Mr. Robertson:

Q. I will ask you, doctor, if the fact that on one occasion, or rather on fourteen occasions, you made no charge, on one occasion you charged one thousand dollars, on another occasion you charged twenty-five hundred dollars, another occasion two hundred and fifty dollars, and another occasion three hundred and fifty dollars, does not clearly indicate that the financial condition of the parties is not one of the very important and controlling considerations, or factors you take into consideration, in fixing a fee?

Mr. Allen: Same objection, and I move that the question and answer as to the amount of charge be stricken from the record.

The Court: That came in without objection.

Mr. Allen: And the same objection to this line of examination.

The Court: Your objection will be sustained.

Mr. Robertson:

Q. When did you first ascertain that Mr. Jeffcott's father was a very wealthy man?

A. I do not know, Mr. Robertson that I ever ascertained that. I did not know anything about the name "Jeffcott", [194] or anything at all like that.

Q. When did you first find out that he was supposed to be a man of considerable means? Was it before or after you sent that statement?

A. I could not say, sir.

Q. Is it not a fact, doctor that you knew it before you ever sent that statement on May 1, 1939?

(Testimony of Edward J. Donovan.)

A. Not necessarily, no, sir. I cannot answer that.

Q. It might have been?

A. It might have been and might not have been.

Q. Is it not a fact, doctor, that this statement and this charge you make—that the charge was made and the statement was sent with the hope or expectation that the grandfather would take care of the bill?

A. No, sir. No, sir, positively not.

Q. How much would it have been, doctor, if Mr. Jeffcott, Sr., was paying the bill?

A. How much would it have been?

Q. Yes.

A. It would have been the same.

Q. Therefore, you make no difference at all as to the financial condition of the people?

A. No, sir, that is not what I said at all. This specific case, when a man asked me to travel six thousand miles to operate upon a baby eight days old, I think I am reasonable in assuming that he is able to pay, and that I have a right to charge what I consider a reasonable fee [195] for that service under those circumstances.

Q. Is it your conception of the law, doctor, that what you decide to charge is absolutely binding upon everyone?

Mr. Allen: I object to that.

The Court: Objection sustained.

(Testimony of Edward J. Donovan.)

Mr. Robertson:

Q. Once you have made up your mind, don't you ever change it?

Mr. Allen: Object to that as too general and argumentative.

Mr. Robertson:

I withdraw the question.

Q. Once you have billed a patient, do you consider that act final, from which you never recede? As a matter of fact, you did agree at one time, to take seventy-five hundred dollars for this fee?

A. I did, sir, I did.

Q. And that was because of the explanation of the financial circumstances of Mr. Jeffcott?

A. No, sir, it was not.

Q. And at that time, Dr. Hamblin, to whom you have referred, went to see you about this fee, and offered you one thousand dollars, plus expenses?

A. Not plus expenses. He knew I had spent about three hun- [196] dred dollars out here and back. He offered me one thousand dollars, and he never said, to my knowledge, that that even included expenses for coming here.

Q. Suppose he had said expenses, would you have settled?

A. For a thousand dollars?

Q. Yes. A. No, sir.

Q. Five hundred dollars a day is not such bad pay for you, is it doctor?

A. I don't work by the day.

Mr. Allen: I object to that.

(Testimony of Edward J. Donovan.)

The Court: Objection sustained.

Mr. Robertson: May I be heard. I know you have ruled. The doctor was required in the interrogatories to answer as to his daily earnings. He did not do so.

Mr. Allen: I object to that. I resent counsel interposing into this record matters not in evidence and not properly to be put in evidence, and I object to any discussion about the daily earnings of the doctor, on the very good authority that they are no element in this case, and I can cite authorities to that effect. [197]

Mr. Robertson: May I suggest that——

Mr. Allen: I do not think you could get a better citation than 48 Corpus Juris, page 1166, and the next two or three pages subsequent thereto, and the cases cited therein.

The Court: Does that hold that evidence of the daily earnings of the doctor are admissible?

Mr. Allen: 1917 LRA, 1271: "Daily income may not be considered" is the statement of those authorities.

Mr. Robertson: Once again I think it is evident from the antiquity of these citations that it relates to times when the evidence of doctors' earnings, or the earnings of the patient, were not admissible. Will you read the question?

The Reporter: (Reading)

Q. Five hundred dollars a day is not such bad pay for you, is it, doctor?

(Testimony of Edward J. Donovan.)

A. I don't work by the day.

Mr. Robertson: That is the question you made objection to and the court sustained it. All right. [198]

Mr. Allen: May I move the partial answer be stricken?

The Court: Yes.

Mr. Robertson:

Q. But at any rate, doctor, your gross annual earnings for the year 1939, including the twenty-five hundred dollars you were paid by Mr. Jeffcott, were forty-thousand, eight hundred and eighty-seven dollars and five cents?

Mr. Allen: Object to that as immaterial.

The Court: The testimony is already in, I believe.

Mr. Allen: I believe that is correct. I apologize, your Honor.

Mr. Robertson:

Q. What were your net earnings doctor, from your profession?

Mr. Allen: Object to that as immaterial. It can have no earthly bearing upon the charge made by the doctor in this case.

The Court: The witness may answer the question. [199]

The Reporter: (Reading)

Q. What were your net earnings, doctor, from your profession?

Mr. Allen: I assume that is for the year 1939.

(Testimony of Edward J. Donovan.)

Mr. Robertson:

Q. For the year 1939.

The Court: That is from the doctor's practice?

Mr. Robertson: From his practice only.

A. I can furnish that specifically, if you want me to.

Mr. Robertson:

Q. Not in exact dollars and cents, doctor. If you can, give it to me merely as a rough estimate.

A. I would say about thirty thousand dollars.

Q. About thirty thousand dollars?

A. Yes.

Q. How many fees of over twenty-five hundred dollars did you charge in 1939?

Mr. Allen: That is objected to as immaterial, and not proper cross-examination.

The Court: Well, the doctor may answer the question. [200]

A. I can say two offhand.

Mr. Robertson:

Q. Was this fee one of them?

A. Was this fee? What did you say?

Q. I said in excess of twenty-five hundred dollars? A. No, sir.

Q. In other words, you made three charges in excess of twenty-five hundred dollars in 1939?

A. I see what you mean now. I did not understand that specifically. By charges, you mean the entire bill, and I did not understand it that way.

(Testimony of Edward J. Donovan.)

Mr. Robertson:

I withdraw the question and shall straighten it out.

Q. How many fees in excess of twenty-five hundred dollars did you charge in 1939 for the performance of a surgical operation?

Mr. Allen: I make the same objection.

The Court: The doctor may answer the question.

A. I cannot say exactly, but I can say this: That I know of a fee of five thousand dollars, and I know of a fee of thirty-five hundred dollars, and further than that I cannot say without my records. [201]

Mr. Robertson:

Q. Were those fees paid, doctor?

A. Yes, sir.

Mr. Allen: I object to that as immaterial, and move to strike the answer.

Mr. Robertson:

Q. Will you state the nature of the operation and the financial circumstances of the parties.

Mr. Allen: I make the same objection as heretofore made to this line of questioning.

The Court: I make the same ruling.

Mr. Robertson:

Q. Doctor, judging from your testimony of your credentials, you no doubt are considered the leading or one of the leading baby specialists in the city of New York, and I will ask you if it is not true that included among your patients, mostly for that reason, are the more wealthy people in the city of New York?

A. No, sir.

(Testimony of Edward J. Donovan.)

Q. Is it not a natural thing, doctor, for those who can afford the best to get the best?

A. It may seem so, but I have many patients who are very poor. [202]

Q. But is it not a fact that you get more of the wealthy patients who are in need of your services?

A. No, sir, there is pediatric surgery done in every hospital in New York probably.

Q. And these men whom I am going to name are first class surgeons. Dr. Heeks?

Mr. Allen: That is objected to as immaterial, your Honor. Dr. Heeks has no bearing on this case.

The Court: Perhaps not, but you may answer the question.

A. Dr. Heeks is a very much younger man than I am, and has had very much less experience than I have. He is a very good doctor, but is not outstanding in that field.

Mr. Robertson:

Q. Dr. Soli?

Mr. Allen: Same objection.

The Court: I don't know but what it will be material.

Mr. Allen: May I reserve my objection to the entire line?

The Court: Very well. [203]

Mr. Robertson: I avow that these doctors whom I am now naming are in the depositions taken by the plaintiff as being outstanding surgeons in this particular line of work in New York City.

(Testimony of Edward J. Donovan.)

Mr. Allen: The avowal does not aid the situation. There is no issue regarding those men. Their qualifications are not in issue at the present time here.

The Court: You are attempting to establish by this witness the standing and professional experience of some physician whose deposition is here?

Mr. Robertson: I am attempting to show that notwithstanding the fact although Dr. Donovan is perhaps better known than many other surgeons who specialize in this particular line, that there are many others in the country who are equally competent, and then I am going to tie that into another phase of the case.

Mr. Allen: I make that objection.

The Court: There is another reason—not proper cross-examination. [204]

Mr. Allen: I thought I made that objection.

The Court: The objection is sustained.

Mr. Allen: May my objection be preserved as to all of these anticipated questions at this time?

The Court: Very well.

Mr. Robertson:

Q. I will ask you if it is not true that the following doctors are considered to be high-class specialists in the line of baby surgery in the vicinity of New York City: Heeks, Solley, Touroff, Farr, Peterson, and Dr. Sullivan.

Mr. Allen: You are not to make any answer.

(Testimony of Edward J. Donovan.)

Mr. Robertson:

Q. I ask you also if Dr. Ladd, of Boston, is not considered to be equal to you in the line of surgery in which you specialize?

Mr. Allen: I stipulate that. I have no objection to that. If it is of any value, I will so stipulate. [205]

Mr. Robertson:

Q. Now, doctor, this intestinal blockage is not a condition that is peculiar to New York City, is it?

A. Intestinal obstruction?

Q. Yes. A. No, sir.

Q. It happens all over the United States, and all over the world?

A. I suppose it does. I do not see why it should not.

Q. And in some way, the patients not in New York City are operated and a good percentage of them survive?

A. No, sir, lots of those conditions are discovered on the death table, lots of them.

Q. Of course, doctor, you have had some bad luck yourself, haven't you? A. Yes.

Q. You don't happen to know any doctors other than in New York who do this work, do you?

A. The first report of this work came from London in 1923, perhaps somewhere along in there. I know other men who would be capable of doing that type of work.

Q. In fact, there are many, many surgeons all over the country?

A. Who are capable of doing that?

(Testimony of Edward J. Donovan.)

Q. Yes. A. I would not say so, sir.

Q. But there are certainly those I have named and no doubt others? [206]

Mr. Allen: I object to that as assuming something which has been denied here. It is an improper question.

Mr. Robertson:

I shall reframe the question.

Q. I will ask you whether or not any doctors out in the western part of the United States, or away from New York, are capable of performing an operation such as the one in question here.

A. I would say Dr. Ladd from Boston and Dr. Morton from Rochester, New York. I mention them immediately because they stand out in my mind.

Q. But you are not acquainted with any doctors in the west or closer to Tucson than New York City who could do it?

A. I would not want to say I am not acquainted with them, but I would not want to qualify for their work, which is a part of the question asked. I may have met them. I do not know them sir.

Q. No discussion was had between you and Dr. Thompson as to whether or not any other doctor who might live closer was available?

A. No, sir, it was not.

Q. You did not suggest to him he might be able to get someone closer?

Mr. Allen: Object to that. [208]

The Court: Anything pertaining to the conver-

(Testimony of Edward J. Donovan.)

sation between this doctor and Dr. Thompson is admissible.

A. If I recommended such a——

The Court: Read the question.

The Reporter: (Reading)

Q. You did not suggest to him he might be able to get someone closer?

A. I did not suggest it, no, sir.

Mr. Robertson:

Q. Dr. Donovan, at any time while you were at the hospital here, did you ever speak to Dr. Thompson about arranging a conference with Mr. Jeffcott to discuss the matter of your fee? A. No, sir.

Q. You never indicated in any way a desire on your part to have the matter settled before you went back to New York? A. None whatever.

Q. Do you know whether or not Dr. Thompson or Dr. Carrell told Mr. and Mrs. Jeffcott that you did not intend to leave the city until the sleeper plane Monday evening?

A. I did not, no, sir.

Q. And if that was the case, doctor, doesn't it seem reas- [209] onable that Mr. Jeffcott intended to see you Monday afternoon when he came back from the ranch?

Mr. Allen: Object to that, to the form of the question.

The Court: Objection sustained.

Mr. Robertson:

Q. I believe you stated that you could not say whether or not Mrs. Jeffcott told you that her hus-

(Testimony of Edward J. Donovan.)

band had wanted to see you before you left when you came in to see her just before you left?

A. That he had wanted to see me?

Q. Yes, just before you left for the plane.

A. I don't remember any such statement.

Q. You would not say that she did not make such a statement, would you?

A. I would not say one way or the other.

Mr. Robertson: If your Honor please, may I interrupt the examination? I have just indicated to Mr. Allen my intention to make a motion for continuance of the case, as I indicated to the court at the time I made a motion for continuance prior to the beginning of the testimony, at the conclusion of Dr. Donovan's testimony, and I have suggested to Mr. Allen that I might cut short my examination and be willing [210] to carry through as long as possible, if Dr. Donovan plans to get away tomorrow, if the continuance is granted. My reason for asking the continuance is that we have a case definitely set for trial on Tuesday, and we have under subpoena over thirty witnesses, most of whom are old Mexican people, and it is going to necessitate my scouring over Santa Cruz County and the southern part of Pima County, in order to get started on Tuesday morning. Certainly no hardship can be worked upon anyone in this case, as Dr. Donovan's testimony will be before the court and the depositions can be taken care of at some time convenient, and Mr. and Mrs.

(Testimony of Edward J. Donovan.)

Jeffcott and the doctors I intend to use on the question of the reasonableness of the fee can be taken up at some time after the other case is disposed of. It was more or less my impression that the court would kindly receive my motion for continuance. You did not bind yourself to grant the motion in any sense, but I was in hopes you would grant my motion.

Mr. Allen: May it please the court. That brings up another embarrassing situation, as any of these matters between counsel are, but I am forced to oppose such motion on a number of grounds. In the first place, it is predicated only upon the convenience of counsel, and as much as I dislike to stand here and say so, I am forced to say [211] that that is no ground for the continuance of a case. Secondly, it was my understanding that this case would be completed. I agreed that I would do anything within my power to complete the presentation of the case, but it is not agreeable to me, and it would not be agreeable to the plaintiff—I know it is not agreeable to him—that testimony on the issue of fees be presented in his absence. As a matter of reservation of ruling upon objections or the postponement of the argument of the case, or anything of that sort, I certainly would not be heard to oppose it, but this is basic and fundamental. There are experts to come here, or those who seek to qualify as experts. This is a surgical case, if the whim might strike one to so designate it, and I think it is vital to this

(Testimony of Edward J. Donovan.)

plaintiff's right that he be permitted to confront those witnesses and be present during their testimony. There is no justification that he be asked to return to New York and make a second trip out here, at an expense of seven hundred fifty to one thousand dollars to meet someone's convenience.

The Court: I gather that your case in Superior Court starts Friday, the fifth?

Mr. Robertson: No, sir, it starts next Tuesday, and is a case that will last two or three weeks, and I don't want to differ [212] with counsel but it was definitely understood that we would start to trial, let him produce his testimony, and then at the conclusion, if I chose I might make a motion for continuance, and Mr. Allen's attitude at that time—I won't say that he agreed to it.

The Court: The court did not understand that the case would go to trial and then the taking of testimony would be interrupted. I did not understand that to be the case.

Mr. Robertson: It was even discussed that we might even postpone the depositions in the plaintiff's case until after this other case had been disposed of.

Mr. Allen: That is all right. You may argue the admissibility of the depositions at any time. I thought we might be able to finish this case, or at least all portions of it in which Dr. Donovan's presence is necessary.

Mr. Robertson: It won't be possible, because I will have at least four medical witnesses on the

(Testimony of Edward J. Donovan.)

reasonableness of this fee, and I can assure you there will be nothing brought in here concerning negligence or impropriety in the manner in which the operation was performed, and Dr. Donovan need not anticipate any such thing as that will be brought [213] in court.

The Court: I would not feel disposed to interrupt the orderly procedure of this case. At the completion of the submission of testimony, if counsel desire, instead of arguing the case at that time, to have an extension of time for briefing the case, the court would allow that, but I do not feel that the situation warrants the court in disrupting the case right in the midst of the taking of testimony.

Mr. Robertson: That certainly was not the understanding created in my mind at the time you overruled my motion for continuance.

The Court: Well, do you want to take advantage now of the twenty minutes before the recess hour?

Mr. Allen: Plaintiff would like very much to.

Mr. Robertson: Is it the court's ruling, or will the court state that when I make my motion for continuance it will be denied?

The Court: There is nothing before the court now to authorize the court to interrupt the orderly procedure of taking tes- [214] timony in the case. The main witness is here. We shall have to proceed on through the taking of the testimony in the case, and then, after the case is submitted, if indulgence is desired at that time, the court may entertain a

(Testimony of Edward J. Donovan.)

motion to that effect. That is the situation. In fairness to everybody, these depositions will have to be read by the plaintiff in presenting his case. So if it takes from now to the end of next week, we shall go ahead with the presentation of the case.

Mr. Allen: That is what I am asking for, is to finish the case.

The Court: Very well.

Mr. Robertson:

Q. How many fecal fistulas, doctor, have resulted from the eighteen operations you have performed upon infants in this nature of case?

A. How many fecal fistulas have resulted from the operations I have performed?

Q. Yes, how many have you had?

A. Three existed at the time they were operated upon. Three were present at the time they were operated upon.

Q. How many have come into being where they did not exist at the time of the operation?

A. None.

Q. Except the Jeffcott baby? [215]

A. Yes, sir.

Q. And you were relieved of the responsibility of at least the menial task of taking care of the post-operative attention to this child?

A. I was relieved of that?

Q. Yes.

A. The menial task? Yes, sir.

Q. Had the operation been performed in New

(Testimony of Edward J. Donovan.)

York that would have been a part of your operative duty? A. Yes, sir.

Q. It would have necessitated your seeing the child each day for a number of days, wouldn't it?

A. Yes.

Q. Did you perform the post-operative work in each of the other eighteen operations?

A. Post-operative care of the patients?

Q. Yes. A. Yes, sir.

Q. And was that figured in as a part of the fee or the charge you made in each of those cases?

A. Yes, sir. It does not amount to much.

Q. It does not amount to much? A. No.

Q. It is something you might have to be doing when you could be in your office or doing some other operative work?

A. No, sir, that is not so.

Q. You make no charge for anything, then, other than the [216] operation itself?

A. That includes a good many things. You do not make a specific charge for this, that or the other thing. A fee will include an office visit or two or three or four, a consultation after the operation, several things like that, and post-operative care of the patient perhaps.

Q. And didn't the fact that you did not have to do the post operative care of this patient enter into the charge you made? A. No, sir.

Q. You charge no more and no less because of that? A. No, sir.

(Testimony of Edward J. Donovan.)

Q. Did you take into consideration, doctor, the realization of the expense that Mr. and Mrs. Jeffcott were required to incur in connection with the charges of the doctors here, Dr. Carrell, Dr. Tappan and Dr. Thompson, the hospital, and the expenses of the nurses?

A. No, sir, that was not my concern at all.

Q. And the fact that they may have incurred some three thousand additional expense did not enter into your consideration at all?

A. No, sir.

Q. The only way it might have affected your consideration would have been for you to increase the amount of your fee, realizing they were spending that much money. Is that true?

A. May I have that repeated? [217]

The Reporter: (Reading)

Q. The only way it might have affected your consideration would have been for you to increase the amount of your fee, realizing they were spending that much money. Is that true?

A. No, sir, it had no effect whatever on my fee. My fee was special for operating on a baby six thousand miles away.

Q. Six thousand miles away from where?

A. Six thousand miles away from me—Well, three thousand miles away from me—and saving the baby's life, traveling six thousand miles to do it—special.

Q. You would not have done it for twenty-five hundred dollars?

A. I would not.

(Testimony of Edward J. Donovan.)

Mr. Allen: Objected to as having been asked and answered.

The Court: The question and answer may stand. It is repetition.

Mr. Robertson: That is all. [218]

Re-Direct Examination

By Mr. Allen:

Q. You were asked on cross-examination how much time was required to reply to and advise Dr. Thompson relative to the post-operative progress of this case, and I believe you replied that little time was required. How much skill was required in order that a surgeon might give valuable advice under those circumstances?

A. Under those circumstances, I would say considerable. I shall have to say it that way. How can you measure skill otherwise?

Q. Will you state whether or not you were subject to call while you were at Atlantic City, at or about the time of the employment negotiations on this case? A. Yes, sir.

Q. Were you or were you not?

A. I was on call.

Q. I will ask you whether or not you were subject to call here at Tucson, Arizona, while you played a game of golf with Dr. Carrell on the afternoon of the operation?

A. Do you mean by "subject to call" could I have been called?

(Testimony of Edward J. Donovan.)

Q. Yes, were your whereabouts known so you could be called?

A. I think everyone knew I was playing golf with Dr. Carrell.

Q. You mean everyone at the Desert Sanatorium? A. Yes, I thought so.

Q. What was the situation while you were having dinner [219] that evening?

A. I don't remember too much about that dinner. There probably was a telephone there. I really do not know much about that dinner.

Q. What were the indications, Dr. Donovan, following the operation, as to the probability of there being any need of your presence throughout the afternoon? A. Nothing.

Q. What was the situation in that regard when you examined the patient during the latter part of the afternoon, in reference to your evening of absence?

A. I was very pleased with the baby's condition.

Q. Now, Dr. Donovan, why would you have refused to come to *come to* Tucson, Arizona on this particular case for a fee of twenty-five hundred dollars?

A. My responsibility to my own family, a responsibility to my patients, my practice. I would not take that risk for a fee that I can get just as easily in New York.

The Court: A little louder, doctor.

A. I would not come to Tucson, Arizona, for

(Testimony of Edward J. Donovan.)

that fee because I feel that I have a very definite responsibility to my family, my own family, and to my patients and to my other patients I may have in the hospital at that time, and I would see no point in my running a risk like that when I can get the very same kind of fee at home. [220]

Mr. Robertson: I object to that last statement and move it be stricken. There is no evidence of it, and no justification for the remark being made.

Mr. Allen: I have no objection. It may be stricken.

Q. Dr. Donovan, will you state how many times during the course of your practice you have refused to see or operate upon any patient within the territorial limits of your practice in New York, or in the vicinity of New York?

Mr. Robertson: I object to that as entirely incompetent and immaterial, because the patient's circumstances and conditions as to whether he did or did not cannot be brought forth in this court. It is more improper than any question I asked him about other fees, because that was a definite transaction.

Mr. Allen: They went into the refusal to come out here and raised an insinuation that there is some duty on the part of the doctor to go anywhere in the world to perform an operation, and I want to bring out the facts and circumstances that enter into it. It is permissible because of the attempted cross-examination on his assumed refusal to come here. [221]

(Testimony of Edward J. Donovan.)

The Court: I will recess now until ten o'clock tomorrow morning, and then I shall hear you on your objection. I will say to counsel now that tomorrow is a holiday, but if it will help the counsel, we will work through until one o'clock.

Mr. Robertson: That does not help my situation at all, so whatever the court desires to do is all right with me.

On Friday, January 31, 1942, at the hour of ten o'clock in the forenoon, the trial of the case was resumed, with the same appearances as heretofore.

Mr. Allen:

May it please the Court. In opposing counsel's motion for continuance yesterday afternoon, I did not in any wise wish to oppose any move which might shorten the progress of this trial to a point at which recess might reasonably be taken. This is a suggestion I should have made yesterday afternoon possibly, but being a little weary, it did not dawn on me until we had left the court house, but I am perfectly agreeable, on behalf of plaintiff, to stipulate that the order of presentation, the usual order, may be interrupted in this matter, in that, if counsel for defendants desires, that plaintiff will withhold the presentation of his testimony by deposition [222] and reserve the privilege to put that on after defendants' case in chief, and permit the defense to proceed at once, or as soon as the plaintiff rests other than for that testimony, which should be in a very short time, to put on its wit-

nesses, and then the question of depositions can be taken up at some later convenient time. That will be wholly agreeable. In that way, it occurred to me that counsel might well get released from the presentation of this case in time to proceed with the case which comes to trial on Tuesday.

Mr. Robertson: The only thing I have to say is that I have several medical witnesses as to the reasonableness of the fee, as I mentioned yesterday. I also will have to put on Mr. Jeffcott and Mrs. Jeffcott. Their testimony will take at least a day, or more, so it really would not facilitate the matter at all. My plans at the presnt time are to go right ahead, and I have made arrangements with my doctors to be here on Monday, if your Honor goes on with the trial on Monday. I do not have my doctors available now, and am quite sure I would not be able to get them and discuss the matter with them any time today, because I had to make my plans in accordance with the understanding we had yesterday afternoon.

The Court: Mr. Allen, you are ready now for the matter of offering [223] the depositions?

Mr. Allen: Other than some very brief examination of the palintiff. I regret I did not have the presence of mind to make that suggestion yesterday afternoon, but I thought it better to make it this morning than never, if there was anything in it of advantage to counsel for defendants.

Mr. Robertson: If I had known that yesterday afternoon, I would have been able to work with my

experts last evening and be ready this morning, but I did not, and I am not prepared to put them on.

The Court: The counsel understands that this is Saturday and we recess for the afternoon?

Mr. Robertson: Yes.

DR. EDWARD J. DONOVAN,

a witness in his own behalf, resumed the stand for further re-direct examination.

Mr. Allen: Will you please read the last question.

The Reporter: (Reading) [224]

Q. Dr. Donovan, will you state how many times during the course of your practice you have refused to see or operate upon any patient within the territorial limits of your practice in New York, or in the vicinity of New York?

Mr. Robertson: I objected to that as immaterial.

The Court: Objection overruled.

Mr. Allen: You may answer, doctor.

A. Never to my knowledge.

Q. Dr. Donovan, assuming that you had been called upon to come to Tucson to operate upon the Jeffcott baby, but that the nature of the condition was such that you could have made the trip by rail, and had made the trip to Tucson by rail, and had performed the operation upon arrival, as you did, under the circumstances which did prevail in the fee under those circumstances?

matter, what would have been the amount of your

(Testimony of Edward J. Donovan.)

A. You mean with the conditions precisely as they were in regard to risk, and so forth, with the baby?

Q. Yes, except that the trip was by rail.

A. It would have been fundamentally the same. I would have had to be away from my office longer.

Q. There would have been no substantial difference in the [225] amount of your charge?

A. No, sir.

Mr. Allen: Now, if it please the Court, I have no further examination of this witness on redirect, but I have given some further thought to the objection that was interposed in the course of cross-examination yesterday afternoon. The court will recall that the witness was questioned relative to some fees of lesser amounts for similar operations performed at New York. No objection was interposed to that, on the theory that it was probably proper to permit counsel to inquire into the fact that the operation had been performed in other cases for a lesser amount. I objected to the further examination as to the details surrounding those operations.

The Court: An objection was sustained to the examination as to the financial condition of those other patients.

Mr. Allen: The objection was predicated upon the law would not permit the plaintiff to show what he had charged in this case, related to what he had charged in previous cases. It occurs to me

(Testimony of Edward J. Donovan.)

that there might be a possibility that the evidence should be admitted as to the amount of those lesser charges, under the theory of cross-exami- [226] nation that a party is entitled to explore those matters that develop in the course of cross-examination.

The Court: Do you want to withdraw your objection?

Mr. Allen: I am willing to withdraw the objection for the sake of guarding against any possible error in the record of the case. I withdraw the objection, and agree that the counsel, on taking the witness for re-cross at this time, may examine him on that point, if he so desires.

Mr. Robertson: I object to counsel's suggestion that his objection be withdrawn. The objection was made in the orderly course of my examination, it was argued, and the court ruled. You will appreciate it is difficult for me to go back and unearth all the questions and revamp my cross-examination. If any error was committed by counsel, I am afraid he will have to take the consequences.

Mr. Allen: That is all right.

The Court: Now, Mr. Robertson, you may have the advantage or disadvantage of it. There is an offer here to cross-examine, and if circumstances do not warrant your taking advantage [227] of that offer——

Mr. Robertson: I want the record definitely to show that I am not consenting to his withdrawing

(Testimony of Edward J. Donovan.)

the objection, and I am objectng at this time to his coming along and withdrawing his objection, because the record was made, and the weight of it will have to be borne by counsel for plaintiff.

Re-Cross Examination

By Mr. Robertson:

Q. So, doctor, if you had come to Tucson by rail, I believe you said, the hazard of air travel would be offset by the additional time you would have to take on the train?

A. I did not say that. I did not say anything about the hazards. I said my charge would be precisely the same, because, as I stated yesterday, the charge was made for travelling six thousand miles and saving the life of a baby. How you come makes very little difference.

Q. Is it not a fact that in figuring up your bill, you put in five thousand dollars for the hazards of that trip by air?

A. That is not true, sir.

Mr. Robertson: I rely on the record, if the court please.

A. I never made such a statement. [228]

Mr. Robertson:

Q. Doctor, I still am unable to see how you take into consideration the financial condition of the patient, as you say you do. Your testimony was that this charge of twelve thousand five hundred dollars was a charge you would have made to anyone who could afford to pay that fee. Yet you testified

(Testimony of Edward J. Donovan.)

that after you found out the limited income of Mr. Jeffcott, that your fee would have been the same. Now, will you explain to me how you take into consideration the financial condition of a patient, even if your first impression of your patient's wealth is subsequently shown to be erroneous.

Mr. Allen: I object, your Honor, as that is not proper within the re-cross-examination, not being a matter touched upon on the re-direct examination. Counsel released the witness after about half a day of detailed cross-examination.

Mr. Robertson: If the Court please, Mr. Allen reopened this line of inquiry by attempting to have the doctor show that actually five thousand dollars of that fee was not because of the hazards of the flight, as he definitely testified to yesterday, and the answer he just gave to my question was that those elements did not enter into it, and so I think once again that line of testimony has been opened up. [229]

The Court: The doctor may answer the question.

A. I do not see why, in considering Mr. Jeffcott's finances, I should be limited to Mr. Jeffcott's income. Some of the clinics you mentioned yesterday, in considering a person's condition, know his net worth, every security he holds, and everything that man owns, and they know it before they name any fee. I do not see why because Mr. Jeffcott's income happens to be whatever it was, five thousand

(Testimony of Edward J. Donovan.)

dollars, that my fee should be changed because of that. It is not my fault. The job I did for Mr. Jeffcott was worth so much. Mr. Jeffcott called me here to do it, and stated before I came that expense was not of any value here. If that is not true, the whole thing has been misrepresented to me. If Mr. Jeffcott's income was that, I do not think I should have been told that expense was no item.

Mr. Robertson:

Q. Where did you get all this information about these various clinics?

A. I said some of the clinics.

Q. When did you get the information? Yesterday you did not have any.

A. No, I did not say that.

Mr. Allen: I object—no such testimony involved here. [230]

Mr. Robertson: It was in the record.

Mr. Allen: The objection was sustained yesterday.

Mr. Robertson:

Q. When did you get the information?

A. I have known that for years, and so has everyone else.

Q. And you also know the clinics I mentioned to you yesterday base their charges on the net income of the patient?

(Testimony of Edward J. Donovan.)

Mr. Allen: I renew the objection that that is improper cross-examination, and also improper on re-cross.

The Court: The doctor may answer the question.

The Reporter: (Reading)

Q. And you also know the clinics I mentioned to you yesterday base their charges on the net income of the patient? A. I do not.

Mr. Robertson:

Q. What do you know about the cattle business, doctor?

Mr. Allen: Objected to as improper cross-examination and improper re-cross-examination. [231]

Mr. Robertson: He has just delivered another dissertation. Every time I ask a question, *me* makes a speech, and has just delivered a long speech about Mr. Jeffcott's holdings and net worth. Now, if he does not know it, I should like the plaintiff to be informed about the cattle business, and what Mr. Jeffcott's holding would amount to.

The Court: Objection sustained.

Mr. Robertson: That is all.

Mr. Allen: That is all, doctor. Now at this time, if your Honor please. I would like to introduce in evidence the testimony of William A. Downes, Carl G. Burdick and Fenwick Beekman, as the same appears within depositions taken in the state of New York, before Albert Gerber, a notary public.

Mr. Robertson: I object to the offer, if the court please, on the ground that the testimony of experts in New York constitutes no measurement of the value of the services rendered by Dr. Donovan in Tucson, and of course I shall reserve other objections as the depositions are read into the [232] record.

The Court: You have made objections to other testimony on that ground and the court has overruled them.

Mr. Allen: What procedure does the court desire followed with reference to the reading of these into the record? Shall I do the complete reading?

The Court: The usual practice has been for one counsel to read the questions and another counsel the answers.

Mr. Allen: I have no other counsel whom I can use, but I can use the plaintiff, if necessary.

Mr. Robertson: I have no objection.

Mr. Allen: I will indicate each time the question and answer.

Mr. Robertson: I may be able to help Mr. Allen out by reading the answers.

Mr. Allen: I would appreciate it very much if you are agreeable to do that. [233]

DEPOSITION OF WILLIAM A. DOWNES

Direct Examination

By Mr. Schmidt:

Q. 1. Dr. Downes, what is your name?

A. William A. Downes.

Q. 2. You reside at Balmsville, Newburgh, New York?

A. Yes. Balmsville is a part of Newburgh.

Q. 3. Before you retired, what was your profession or occupation, doctor? A. Surgeon.

Q. 4. When and where were you admitted to practice as a physician and surgeon, doctor?

A. 1895. New York.

Q. 5. Omitting your preliminary education such as college, and so forth, in what schools did you attend in preparing for the practice of surgery and medicine?

A. College of Physicians and Surgeons, Columbia University.

Q. 6. How long were you in attendance at such school, doctor? A. Three years.

Q. 7. What degree, if any, did you receive from such school, doctor? A. Doctor of Medicine.

Q. 8. Do you recall what year your degree was conferred upon you? A. 1895. June 10.

Q. 9. Did you have any other and special training which was designed to fit and prepare you for the practice of [234] such profession?

A. I served an internship at the New York Cancer Hospital sixteen months, and at the New York Hospital eighteen months.

(Deposition of William A. Downes.)

Q. 10. Did you practice surgery and medicine from that date—until when?

A. Surgery. I never practiced medicine. I practiced surgery from 1895 to 1927.

Q. 11. And you retired in 1927, doctor?

A. Yes.

Q. 12. During that time, or now, are you a member of any professional organizations in which admission to membership is dependent upon the demonstration of special professional qualifications or accomplishments?

A. The New York County Medical Society; the American Medical Association; the American Surgical Association; the New York Surgical Society; the Southern Surgical Society. Practically all smaller societies.

Q. 13. What special professional qualifications or accomplishments were requisite to membership in each of those organizations to which you belonged, doctor?

A. Surgery was the outstanding thing in each of them.

Q. 14. Were they honorary organizations, doctor? A. What do you mean by that?

Q. 15. I mean they were organizations in which only persons of outstanding ability in surgery were qualified to join? [235]

A. They were special societies like surgical societies, yes: the American Medical Association, any department of medicine entitles you to be a member.

(Deposition of William A. Downes.)

Q. 16. Will you state as fully as you can the nature and extent of your past experience in the practice of your professional of surgery.

A. I specialized in surgery when I first started practicing, which was in 1899. All of my hospital appointments were in surgical service. You might say that I specialized in it.

Q. 17. Were you connected with any hospitals in New York City, doctor?

A. New York Hospital, New York Cancer Hospital, St. Luke's Hospital, St. Francis's Hospital, Babies Hospital, Hospital for the Ruptured and Crippled. Maybe one or two more.

Q. 18. Were you on the staff of any of those hospitals, doctor? A. All of them.

Q. 19. It is a fact that you were the head of the surgical staffs of any of those hospitals, doctor?

A. Yes.

Q. 20. Which hospital or hospitals?

A. Babies Hospital.

Q. 21. What years were you the head of the staff of the Babies Hospital, doctor?

A. From 1910 until the time I retired. In 1910 I first went there. [236]

Q. 22. During your professional career, doctor, to what extent, in the course of your professional training and practice, have you become familiar with surgery incident to intestinal obstruction in the new-born due to volvulus?

A. I was in charge of the Babies Hospital twenty

(Deposition of William A. Downes.)

years. I saw all of the intestinal cases, all of the serious cases that came in during that time, including volvulus, intussusception, and pyloric stenosis.

Q. 23. The Babies Hospital, doctor, as its name implies, I assume treats primarily infants.

A. I think the age limit was supposed to be four years old.

Q. 24. That is, from birth to the age of four?

A. Yes.

Q. 25. To what extent, in the course of your professional training and practice, have you become familiar with general surgical conditions of infancy and childhood?

A. Well, we had all sorts of surgical conditions in childhood in the Babies Hospital. When I was active, I did the important cases. We had such fellows as Dr. Donovan here coming along, and doing the others.

Q. 26. But, doctor, during all of the years of your surgical practice you were in large part performing operations on infants?

A. I would not say that that was the large part. I was known more or less as a specialist in infant surgery. [237]

Q. 27. Doctor, how does the surgical operation for the correction of intestinal obstruction in the newborn due to volvulus compare in difficulty of performance to other surgical operations for the correction of other serious conditions of infancy and childhood?

(Deposition of William A. Downes.)

A. We class volvulus as a major surgical condition. A man needs certain experience and opportunity to see those cases before he becomes proficient in the care of them. We class volvulus as a very serious condition; one of the most serious that you can have with young babies.

Q. 28. Doctor, how does such operation for correction of such obstruction compare in probability of success and recovery of patient to operations for correction of other serious conditions of infancy and childhood?

Mr. Robertson: I will object to that, if the court please, because it calls upon the witness to make a comparison and a conclusion which is irrelevant.

Mr. Allen: I think it is a pertinent inquiry, your Honor, as to the knowledge of the expert concerning the surgical condition in issue.

The Court: It is a qualification question. [238]

Mr. Allen: And going to the comparative seriousness or gravity involved in this case.

Mr. Robertson: The question was clearly not ask to qualify Dr. Downes, but asked to compare the operation Dr. Donovan did with another operation and for that it is a comparative question and irrelevant.

The Court: Objection overruled.

A. To begin with, it depends on how soon after the trouble was noticed that the surgeon gets the case. Per se, the operation is one of the most serious—the condition is one of the most serious there is, in babies.

(Deposition of William A. Downes.)

Q. 29. How does such operation compare in difficulty of performance to some of the more serious operations which surgeons perform in cases of children of more advanced age or in cases of adults?

Mr. Robertson: The same objection, and I would like a continuing objection to all questions along this line.

The Court: Same ruling. You may go ahead.

A. With the child, it is the more serious operations. The [239] procedure, how to go ahead when he is operated, is often guided by the experience of the surgeon. His condition has to be handled with the greatest care. The outcome depends upon the judgment which the man uses in doing the operation, knowing what to do and what not to do.

Q. 30. How does such an operation, that is, for intestinal obstruction by reason of volvulus, compare in probability of success and in probability of recovery of the patient, to some of the operations performed by surgeons upon children of more advanced years or upon adults for the correction of conditions of a related degree of seriousness?

A. To begin with, as I said before, the seriousness of the operation depends at the start on the age of the patient. With a young infant it is very much more serious than in an adult; and that is where the experience of a children's surgeon comes in. A man who operates for volvulus on an adult will do it perfectly well as a general surgeon, but in an infant the man who has had the experience is the one who gets through the operation.

(Deposition of William A. Downes.)

Q. 31. Let me ask you this, doctor. In answering the few questions heretofore, where comparative operations are suggested, the skill of the surgeon performing the operation is always involved, is it not? A. Yes.

Q. 32. To what extent, if you know, must a surgeon have special- [240] ized training, experience and skill in the performance of such operation for the correction of intestinal obstruction in the newborn due to volvulus, in order that such surgeon may be expected to perform such operation with high degree of probability that the condition will be corrected and that the patient will recover?

Mr. Robertson: I object to that question on the ground it is permitting the witness to speculate and forecast. It is entirely impossible for even a specialist and expert to make a guess upon. You are not calling for an opinion of the specialist, but just asking him to make a guess.

Mr. Allen: I note, your Honor, that Question 32 is amended by counsel thereafter, so maybe we had better consider the amended question.

Q. 32. Amended: From your experience, doctor, to what extent, if you know, must a surgeon have specialized training, experience and skill in the performance of such operation for the correction of intestinal obstruction in the newborn due to volvulus, in order that such surgeon may be expected to perform such operation with high degree of probability that the condition will be corrected and that the patient will recover? [241]

(Deposition of William A. Downes.)

Mr. Robertson: Same objection.

The Court: Overruled.

A. I can best illustrate that by saying that when a medical man has a baby in his practice that he thinks has volvulus or other intestinal obstruction he makes an effort to get the surgeon best qualified to do babies' work.

Mr. Robertson: I object to the answer to that question for the reason that it is not responsive and states a conclusion of the witness.

Mr. Allen: I concede the correctness of the objection.

The Court: Proceed with Question 33.

Q. 33. Doctor, from your experience, when a doctor ascertains that a newborn baby has an intestinal obstruction due to volvulus is it the practice and would it be the course of wisdom for him to call in a surgeon who is specialized in such operations?

A. By all means, if you can get one.

Q. 34. Dr. Downes, from your experience as the head of the [242] Babies Hospital, will you give the benefits that the surgical profession receives from its formation and its conduct.

Mr. Robertson: Object to that as being entirely immaterial.

The Court: All right. The objection is good.

Mr. Allen: I believe it is good and consent to sustaining it.

Q. 35. I mean what special facilities are present in a hospital such as the Babies Hospital, by which

(Deposition of William A. Downes.)

surgeons can better their knowledge on intestinal conditions of newborn babies and their treatment of them?

Mr. Robertson: Same objection.

Mr. Allen: As to that objection, I would say, your Honor, that apparently the question is foundational to the later showing within the deposition that the plaintiff in this case, subject of this expert's testimony, as a part of his qualifying training and as a very substantial portion of his experience in the field of specialized surgery, has been connected with Babies Hospital; consequently, I think it has materiality in going to show the doctor's training.

[243]

The Court: Objection overruled.

A. Almost every good hospital has a babies' department: St. Luke's; New York—and they have experienced internes and experienced nurses in babies' wards: that is about all I know of. Of course they have incubator service, and things like that; but all good hospitals have those things.

Q. 36. Doctor, in the course of your surgical experience have you come in contact with conditions of intestinal obstruction due to volvulus in newborn babies? A. Yes.

Q. 37. Have you performed operations in those cases? A. I have.

Q. 38. And you have made a special study of that type of operation, doctor?

A. I would not want to say that I have made an especial study of that type of operation.

(Deposition of William A. Downes.)

Q. 39. But in the course of your other studies, you have studied that also?

A. Yes, I have operated on them in proportion relatively: the same number of those cases as of intussusception and other things.

Q. 40. Doctor, what surgeon or surgeons of the state of New York, if you know, had had sufficient special and outstanding training and experience on April 1, 1939, to [244] prepare and fit him or them to perform such operation for correction of intestinal obstruction in the newborn due to volvulus with high degree of probability that such operation would correct such condition and that the newborn patient would recover?

Mr. Robertson: I object to the question, if the Court please, because it singles out only the state of New York, out of the forty-eight other states and possessions and territories.

The Court: I have passed on that objection, so the objection will be overruled.

A. You want me to mention names?

Q. 41. Yes: any surgeons that you know of in the state of New York.

A. I only knew surgeons who more or less specialized in babies' surgery, that is, I mean to say that were on the staff of the Babies Hospital. Dr. Donovan would be my first choice. Then there would be Dr. Heeks, who is an assistant there; Dr. Solley. They happen to be the only ones that I know of personally now. A great many have come up since my time.

(Deposition of William A. Downes.)

Q. 42. In listing the surgeons you have just listed, doctor, can you state with regard to ability where Dr. Donovan would stand in that list? [245]

A. He would stand first. He was in charge of the institution, and has had more experience.

Q. 43. You place him first, you say, and what would be the reason for placing him first, doctor?

A. His experience.

Q. 44. His experience in this type of operation?

A. Yes, babies' work.

Q. 45. Do you know of your own knowledge that at that time Dr. Donovan had performed operations for intestinal obstructions in the newborn?

A. At what date was this?

Q. 46. April 1, 1939.

A. I remember Dr. Donovan must have graduated about 1920. I was the attending surgeon at St. Luke's Hospital and Babies Hospital, and I appointed him assistant at both of those places, and he has gradually grown up. He probably did like I did when I was an interne and acting assistant, sat around in the corner holding the bag.

Q. 47. Doctor, you used the *nervacular*, "holding the bag". Will you explain what you meant by that, in your previous answer.

Mr. Robertson: I object to that question as being entirely irrelevant and immaterial, and as not responsible to the previous question.

Mr. Allen: It is explanatory of the answer to the previous question. [247] It makes no earthly difference to the ultimate issue in the case.

(Deposition of William A. Downes.)

The Court: It may go out.

Q. 48. Doctor, it is the doing of those things that you have named that eventually lead to skill in surgery?

Mr. Robertson: The same objection as to Question 48.

The Court: All right.

Q. 49. So, in repetition, doctor, it is your testimony that Dr. Donovan, in your opinion, from your experience, stood as the most eminent baby specialist surgeon in New York City at that date?

Mr. Robertson: Object to that as leading.

Mr. Allen: I think, in view of the fact it states it is repetition, that it is very apparent that it is a question merely for emphasis, and could be either denied or allowed.

The Court: Your representative in New York consented to strike it out. [247]

Mr. Allen: I did not notice that.

Q. 50. Doctor, from your knowledge and experience, in what position would you fix Dr. Donovan in the City of New York and in the State of New York relative to his ability to perform operations on newborn babies?

Mr. Robertson: I object to the question because it is evident from the doctor's testimony that he has had no knowledge of Dr. Donovan's work since 1927, when he retired.

Mr. Allen: Well, I don't think the objection is well taken.

(Deposition of William A. Downes.)

The Court: The objection is overruled and the answer may be read.

A. Based on my knowledge before 1927, when he used to help me operate, and from my experience at that time, I would say that Donovan was head and shoulders above any other man in New York. It is very difficult to find a man who is willing to give his time to infant work.

Q. 51. You found that Dr. Donovan did give his time in that way?

A. Yes. Of course, when a man gets an opportunity to be head of Babies Hospital surgical department, he becomes ambitious to be on top of his profession in that branch. [248]

Q. 52. Doctor, from your experience and knowledge of surgical affairs throughout the nation, what is your opinion as to the position that Dr. Donovan stands in relative to the operation and surgical treatment of newborn babies suffering from intestinal obstruction due to volvulus?

Mr. Robertson: I object to that question, because there is no showing that the witness has any knowledge whatsoever of surgical affairs throughout the nation. In fact, he has already stated that his knowledge is very limited, and confined to New York and vicinity.

The Court: The objection is overruled. Go ahead, read the answer.

A. I would say that he stood at the top. I only know of one other surgeon in this country who has

(Deposition of William A. Downes.)

grown up in baby surgery exclusively. That is Dr. Ladd, in Boston, head of the Childrens Hospital in Boston.

Q. 53. So in your opinion Dr. Ladd and Dr. Donovan then are the two outstanding surgeons in this special line of operation in the nation?

A. To my knowledge. That is limited to my own personal knowledge. You would hardly believe it if Dr. Donovan were to tell you how many infants under two or three months old that he has operated on for various conditions. [249]

Q. 54. It is that knowledge of yours that leads you to answer these previous questions correctly, doctor, is it not? A. Yes.

Q. 55. Can you state, doctor, from your own knowledge, what surgeons in the United States were then, that is, April 1, 1939, generally regarded by the members of the medical profession of the United States as those best qualified in the field of specialized surgery for intestinal obstructions in the newborn due to volvulus?

Mr. Robertson: I object to the question because there is no evidence of any such knowledge on the part of the witness.

The Court: The answer may come in.

A. I could not answer that question, because it has been ten or twelve years since I have seen a number of surgeons together and discussed it. Hospitals as a whole are taking much more interest in surgery of babies than they used to, because men are being trained to specialize in it.

(Deposition of William A. Downes.)

Q. 56. Doctor, from your own knowledge and experience can you state what training and experience Dr. Donovan had prior to April 1, 1939, which particularly qualified him to engage in the professional practice as a surgeon giving such specialized attention to newborn babies?

Mr. Allen: I anticipate that there will be a motion to strike the answer as not responsive, and have no objection to it.

Mr. Robertson: Yes, there is.

(Answer not read.)

Q. 57. Doctor, since 1927, when you retired, what contact have you had with Dr. Donovan relative to his professional activities?

A. He was in the office with me up until the time I—in 1927 I quit operating as a surgeon, but I looked after general things for a year or so, and used to go to the hospital; but in the last several years I have had no contact with Donovan as a surgeon. The most I have seen him is to talk things over. He has come to me to discuss cases a good many times.

Q. 58. Since 1927, doctor, have you kept in touch with the surgical profession by reading their pamphlets and books and statements that come out?

A. Yes.

Q. 59. Doctor, have you any knowledge as to the degree to which Dr. Donovan was in demand on or about April or [251] May, 1939, at meetings of medical society members as a speaker on subjects

(Deposition of William A. Downes.)

related to the field of intestinal obstruction of newborn infants?

Mr. Robertson: That is objected to as immaterial.

The Court: The answer may be read.

A. I can only answer that by reading programs and papers that appear in surgical journals Donovan has been very much sought after for reading papers before medical societies, both local and national.

Q. 60. You know that of your own knowledge, doctor? A. Oh, yes.

Q. 61. The subjects that he wrote papers on had to do with the operative technique for intestinal obstructions in newborn children, or did some of them?

A. Including the stomach, I would say that was true, stomach and intestinal. He is too modest to tell you.

Mr. Allen: The latter portion may be stricken by consent.

The Court: Yes.

Q. 62. Doctor, you yourself—forgetting all due modesty, were one of the outstanding surgeons in the City of [252] New York up to the date of your retirement, were you not?

A. I think Donovan ought to answer that for me. I have been answering questions for him.

Q. 63. Doctor, have you had an opportunity in the course of your years of practice, as a physician

(Deposition of William A. Downes.)

and surgeon, to know from time to time the basis upon which the more prominent and higher ranking surgeons of New York City determine the fees which they charge for surgical operations?

Mr. Robertson: I object to the question for the reasons stated in objections to the deposition, that is, that the only issue is a fair and reasonable value of the services done by the plaintiff in the case, and for the further reason that there is no foundation which would entitle the witness to express an opinion, and moreover, had such a foundation been laid, that it would be immaterial as to what the custom was in the City of New York.

Mr. Allen: I have only to say that so far as the question goes, it is not dealing with the general field of rank and file of surgeons in New York or elsewhere in this particular case. It is dealing with unusual circumstances of an admittedly specialized surgeon of eminent qualifications. [253]

Mr. Robertson: The law does not know whether it is an ordinary physician or surgeon. His eminence is simply another factor to be taken into consideration in the testimony of the person, but my objection is that this witness has not shown any knowledge of fees charged by other doctors.

Mr. Allen: It is a foundational question, your Honor.

The Court: The question may be answered.

A. I have not had an opportunity of making that comparison myself in the last ten years, probably.

(Deposition of William A. Downes.)

Mr. Robertson: I move to strike the answer for the reason that it is not responsive and clearly shows the witness is not competent to answer the question.

Mr. Allen: I oppose the objection. It indicates the extent of the understanding of this doctor.

The Court: Your motion to strike is denied.

[254]

Q. 64. Did you have such experience prior to your retirement, doctor? Yes or No, please.

A. Yes.

Q. 65. Doctor, have you had the opportunity in the course of your professional practice to know the amount of fee which has been charged from time to time by the more prominent and more able physicians and surgeons of New York City for specialized operations which they have performed?

Mr. Robertson: I object to that, if the Court please, for the reason that the witness's testimony shows that he has no knowledge of any fee schedule or of any custom existing as of April, 1939, because he retired in 1927, before the crash, and his ideas would naturally be higher, or at least the fee schedule he knew about would have been higher than it was in 1939, and, in addition, I object on all of the other grounds I have urged.

The Court: Objection overruled. I think it would go to the weight of the testimony. Go ahead.

A. I would say yes.

Q. 66. Doctor, have you had the opportunity in

(Deposition of William A. Downes.)

the course of and by virtue of your practice as a surgeon to learn and know how such fees have been generally regarded [255] by the members of the medical profession of New York City, as to whether or not they constituted and represented the reasonable value of the professional services involved?

A. I have no way of answering a question of that sort.

Q. 67. Doctor, have you had the opportunity while you were in practice, as a result of and in the course of your years of practice as a surgeon, to learn and know the amount of the charge of prominent and able surgeons who give specialized attention to surgical conditions of infancy for performing the operation for correction of intestinal obstruction in the newborn due to malrotation of the intestines, with volvulus?

Mr. Robertson: I object to that on all of the grounds I have urged to previous questions.

The Court: Objection overruled.

Q. 68. I am just asking for a Yes or No in that, doctor, if you have that knowledge.

A. I would say No, I haven't.

Q. 69. In your past experience, doctor, there have been times when you have performed such an operation and have made a charge; is that correct?

A. Yes.

Q. 70. And you have known of other surgeons of prominence who [256] have made similar operations and charged a fee, have you not, doctor?

(Deposition of William A. Downes.)

A. I don't recall any specific instance of what the charge was. In other words, you would like me to tell you whether I know of any surgeon having this kind of a case, what he charged?

Q. 71. I want to know whether you have known in your experience of a surgeon performing such operations and charging a fee for them.

A. Yes.

Q. 72. Doctor, have you had the opportunity, in the course of and by virtue of your years of practice as a surgeon, to learn and to know what has been the practice from time to time of prominent and able surgeons of New York City in fixing the amount of fee to be charged for specialized operations in cases where they have been called upon to leave their offices and practices in New York and go to distant points within the United States to perform such operations?

Mr. Robertson: Your Honor, to the next two or three questions, there is no intelligible answer given, and the doctor has already stated he has no recollection of any fees he charged, and has no knowledge of fees charged by other men, so I object to Question 72, Question 73, and also Question 74 for that reason. [257]

Mr. Allen: Let us take them up one at a time.

The Court: All right, 72 now, a yes or no answer.

Mr. Allen: That calls for an answer which would constitute an element of foundation, as to

(Deposition of William A. Downes.)

whether or not he has knowledge of one of the elements to be considered by him.

The Court: The witness may answer.

Mr. Robertson: The answer is yes.

Mr. Allen: 72 is a repetition as to that.

(Question 72 was not read.)

Q. 73. Have you had the opportunity in the course of and by virtue of your professional practice to learn and to know what has been the custom from time to time of prominent and able surgeons in going to distant points and there performing specialized operations on the matter of returning patients to the care of local physicians and surgeons as soon after the operation as the condition of the patient indicates the termination of the need for [258] specialized care?

Mr. Robertson: I object to that on the ground it is immaterial.

Mr. Allen: I urge the same grounds in support of it, that it goes to the qualification of the expert.

The Court: The answer may be read.

A. I would say Yes.

Q. 74. What is that practice, doctor?

A. The practice is when an operation is over they turn the patient,—if the condition is such, to turn the patient over either to the family doctor or leave your assistant.

Q. 75. What, if you know Doctor, has been the general attitude of the members of the medical profession relative to approving or disapproving such custom?

(Deposition of William A. Downes.)

A. They approve of it. There would be no objection to that.

Q. 76. Have you become familiar with and are you able, based upon your past training and experience as a physician and surgeon, and based upon your professional knowledge of what constitutes the reasonable value of the professional service of a physician and surgeon, to form and express an opinion as to the reasonable value of the professional services of any prominent and eminently [259] qualified surgeon of the City of New York in performing a specialized surgical operation when you know the following facts, namely, the background of such physician and surgeon in schooling, training and experience; the particular qualifications of such surgeon to perform such specialized operation; the nature of the negotiations by which such surgeon was employed to perform such specialized operation; the means by which such surgeon traveled to and from the point of performing such operation and the length of time during which such surgeon was required to be absent from his New York City office and away from his New York practice in going to the place of the operation, in performing the operation, in remaining with the patient following the operation and in returning to New York City; the time and place at which such operation was performed; the age of the patient at the time of the operation; the personal history of such patient; the results of physical examinations

(Deposition of William A. Downes.)

of the patient by physicians and surgeons; the clinical findings, and other pertinent information concerning the patient which might indicate the nature of such specialized operation; the manner in which such operation was performed by such physician and surgeon; the facts and circumstances which indicate whether the operation was or was not successful, and the facts and circum- [260] stances tending to indicate whether or not the patient should be reasonably expected to recover; knowing all that, doctor, are you from your past experience in a position to form and express an opinion as to the reasonable value of the professional services of such a surgeon?

Mr. Robertson: Now, if the court please: I object to the question, first because the foundation for the expression of any opinion by this witness has not been established, and, in fact, his own testimony shows that he has no ability to enable him to express an opinion as to a fee in 1939; and for the second reason that it singles out specialists and the fee they are entitled to charge, whereas the law on the subject is that it is only the reasonable charge that is to be made by any surgeon, and the fact that he may be one of the top men, or a specialist in a particular type of surgery is not to be taken into consideration in the expression of an opinion by any member of the profession, and for the reason that it incorporates facts not in the record.

The Court: Will you indicate what facts that

(Deposition of William A. Downes.)

are incorporated in this preliminary question that are not in the record in the case? [261]

Mr. Robertson: Just a second. No, I withdraw that, your Honor. Did you understand me? I said I withdraw that. But as an additional objection, it excludes from the testimony of this witness in stating his opinion, the element of the ability of the patient to pay. No place is that expressed as one of the considerations he is to take into consideration in expressing an opinion, and the law is that it must be considered in expressing an opinion.

The Court: The same question was presented here when Dr. Thompson was on the stand.

Mr. Robertson: Yes, sir.

The Court: And the court ruled, sustained the objection to the question, that the element was not in it.

Mr. Robertson: I want to give you a chance to change your mind.

The Court: I think I will be consistent, at least. I want to say this to counsel: I have in a hasty way examined these depositions, and if I have read them correctly, [262] the hypothetical question is practically the same. I think there is one sentence that is different. The question propounded is a lengthy one, and I presume counsel will have occasion to point out to the court the objections that may be raised to this question. I would not want to be hasty in ruling. If there is some question now that has not had the consideration of the court, I would hear counsel and rule further on that.

(Deposition of William A. Downes.)

Mr. Robertson: I believe, your Honor, that at the conclusion of one of these depositions, by some kind of stipulation or agreement as to objections I will have to voice to the material part of the other two depositions, that we can dispense with the ruling on them. I do not believe that the opinions of these doctors are admissible, first, because they show that they have no knowledge of any general fee schedule or any general system. They all admit that the ability of the patient to pay in New York is considered as one of the elements, but the hypothetical question that was propounded to them, and upon which they expressed an opinion, does not contain that element, and I do not, therefore, believe the depositions, except for the qualifying parts, are admissible in any sense of the word.

Thereupon the court took a ten minute recess, after which the trial was resumed. [263]

The Court: Now, as I indicated to counsel during the morning session, I have read these three depositions through, and I do not see the occasion of going through the depositions again now. They are here subject to the objections that are made, or that counsel desires to make to them, and as to the rulings on these depositions, it seems to me that these are matters that the court can rule upon in the final conclusion of the case. I do not see the occasion for going through the depositions again now, and the counsel can, at the proper time, furnish the court with a memorandum brief on the particular

points they desire to raise on the depositions.

Mr. Allen: In other words, the court's ruling is reserved and counsel will be permitted to submit a memorandum to the court on the admissibility.

The Court: Your objections are in the record, and the court will then have an opportunity to rule on them, when the case is all through.

Mr. Robertson: Yes, sir.

Mr. Allen: The answer to that last question is "Yes". [264]

It Is Stipulated by and between counsel for the respective parties that the following questions, and objections, being that part of the deposition of William A. Downes, a witness on behalf of the plaintiff, not read into the record at the time of the trial of this case, and the depositions of Carl G. Burdick and Fenwick Beekman, witnesses on behalf of plaintiff, and taken at the instance of the plaintiff, before Albert Gerber, a notary public, on the dates hereinafter and heretofore mentioned, are herewith incorporated into the transcript of testimony and, pursuant to this stipulation, are to be considered as though read and objections made at the trial of this case.

Deposition of William Downes,
(continued)

Q. 77. If it be assumed that Dr. Edward J. Donovan, who maintains offices at 862 Park Avenue in the city and State of New York, after completion of the usual pre-college schooling, attended the College of Physicians and Surgeons of Columbia

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University from 1917 to 1920, graduated with the degree of M.D., and was elected to Alpha Omega Alpha Society, which is the medical honor society; and if it be further assumed that said Dr. Donovan, following such schooling, was duly licensed by the State of New York and admitted to practice as a physician and surgeon on or about the 1st day of June, 1921; and if it be further assum- [264-A] ed that Dr. Donovan served six months as Assistant Resident Surgeon at Mary McClelland Hospital at Cambridge, New York, and served two years surgical internship at St. Luke's Hospital of New York City from January 1, 1921, to January 1, 1923, and served four months as Resident Surgeon at Lying-in Hospital in New York City, and that during the first year of practice received appointments as Assistant Attending Surgeon at Babies Hospital of New York City, and at St. Luke's Hospital of New York City, and during such service continuing to 1926 he did a great part of the emergency surgery in both institutions, and that in 1926 he was promoted to Associate Attending Surgeon in both the Babies Hospital and St. Luke's Hospital in New York City and in 1926 was appointed as Assistant Professor of Surgery of the College of Physicians and Surgeons of Columbia University in New York City, and is still so acting, and in or about the same time he was made a Fellow of the American College of Surgeons, and in 1929 was elected to membership in the New York Surgical Society, and in 1930 he

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was made Surgeon in Chief of the Babies Hospital, one of the units of the Medical Center of Columbia University, at which hospital all children up to the age of twelve years from the Medical Center are cared for, and that he was at about the same time made a full Attending Surgeon, which is the highest rank given at St. Luke's Hospital, [264-B] *at St. Luke's Hospital*, and together with associate Surgeon was placed in charge and is still in charge of one of the surgical services in said hospital, and that about 1930 he was made and is still acting as Consulting Surgeon at the Yonkers General Hospital at Yonkers, New York, at Northern Westchester Hospital at Mt. Kisco, New York, and at Fitkin Memorial Hospital at Asbury Park, New Jersey, and that in 1936 he was elected to membership in the American Surgical Association, which is a national honorary society whose membership in the United States is limited to one hundred seventy-five surgeons; and assuming further that during the first seven years of practice he engaged in a general practice and surgery at the Babies Hospital and St. Luke's Hospital of New York City, and that during the past twelve years his practice had been devoted exclusively to surgery, and that during the past ten years he has written many articles on abdominal surgery, and has written a chapter on infant surgery published in "Christopher's Textbook of Surgery," which book is used in a great many medical schools throughout the

(Deposition of William A. Downes.)

country, and that he has written a chapter in Nelson's Looseleaf Surgery, on Pyloric Stenosis in infancy, which text book is the most modern standard reference text book in use in the United States, and that he collaborated in panel discussions on intestinal [264-C] obstructions in infancy at the meeting of the American College of Surgeons in 1939, and at the meeting of the Academy of Pediatrics in Boston in 1941; and if it be further assumed that on or about the 1st day of May, 1923, Dr. Donovan established private offices in the City of New York and began there to carry on the practice of his profession as a physician and surgeon, giving specialized attention to surgical conditions of infancy and childhood; and that if it be further assumed that Dr. Donovan thereafter continued and now continues to carry on such specialized professional practice; and if it be further assumed that by April 1, 1939, Dr. Donovan had attained a position of very high standing in the ranks of his profession and was then generally regarded by physicians and surgeons as being one of the very few physicians and surgeons of the United States who had acquired national prominence due to outstanding and eminent qualifications and success in such specialized field of practice of the medical profession; and if it be further assumed that, on or about said 1st day of April, 1939, Dr. Donovan had had a very high and outstanding degree of experience in performance of operations for correction of intestinal obstruction in infants

(Deposition of William A. Downes.)

due to malrotation of the intestine, volvulus and other related abnormalities; and if it be further assumed that, on or about [264-D] April 1, 1939, Dr. Donovan was generally regarded by physicians and surgeons of the United States as then being very highly qualified, by his training and experience, to perform surgical operations for the corrections of intestinal obstruction in the new-born due to malrotation of the intestines, with volvulus; and if it be further assumed that Robert J. Jeffcott, infant son of David C. Jeffcott and Elsie Jeffcott, his wife, defendants in this action in which your testimony is being taken, was delivered at Desert Sanatorium, located at Tucson, Arizona, on March 24, 1939; and if it be further assumed that beginning shortly after birth it was apparent to the physicians and surgeons of Tucson, Arizona, who were then attending such infant, that the said Robert J. Jeffcott was suffering from some abnormal condition; and if it be further assumed, that beginning on the fifth day of life of such infant, it became and was apparent to such attending physicians that a partial obstruction of the intestinal tract of such child was present; and if it be further assumed that the following the taking of gastro-intestinal x-rays of such infant on March 31, 1939, it was the impression of such attending physicians that it was necessary that a surgical operation be performed for the correction of such abnormal condition of such infant; and if it be further assumed that the said defendants in

(Deposition of William A. Downes.)

such ac- [264-E] tion, namely, the said David C. Jeffcott and Elsie Jeffcott, his wife, parents of such infant, were then advised by such attending physicians of the presence of such abnormal condition of such new-born child, of the apparent necessity for such surgical operation and of the seriousness thereof; and if it be further assumed that such parents were thereupon also advised by such attending physicians as to the respective and comparative qualifications, for the performing of such operation, of Dr. Edward J. Donovan and of one or two other physicians and surgeons of the United States, all having national prominence in regard to and as the result of carrying on their professional practice with specialized attention to surgical conditions of infancy and childhood; and if it be further assumed that the said parents of such infant then and thereupon decided that they desired to employ the said Dr. Donovan to perform such operation, making such decision because of Dr. Donovan's high qualifications and his unusual degree of experience, for correction of intestinal obstruction of the newborn child, then apparently needed by their infant son; and if it be further assumed that such parents, then and thereupon, authorized and instructed one or more of such attending physicians to act on their behalf, as their agent or agents, in negotiating with and employing the said Dr. Edward J. [264-F] Donovan to perform such operation on their infant son; and if it

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be further assumed that such agent or agents of such parents then and thereupon pursuant to such authority and instructions communicated to the said Dr. Donovan the information concerning the apparent condition of such infant, the information concerning the desire of such parents to employ said Dr. Donovan to perform such operation and such information as Dr. Donovan desired and requested, concerning the parents of such infant, to aid him in deciding whether or not to accept such employment; and if it be further assumed that such agent or agents of such parents in the course of such negotiations for the employment of said Dr. Donovan advised him that it was the desire of such parents that such operation be performed as soon as possible; and if it be further assumed that in the course of such negotiations between such physician and the said agent or agents, the said Dr. Donovan indicated that such infant could be brought to New York City by airplane and that he would perform the desired operation as soon as possible after arrival of such infant at such city; and if it be further assumed that such parents of such infant were then advised by such agent or agents of such tentative negotiations of such desired employment; and if it be further assumed that such agent or agents then and thereupon and in the further course of such negotiations and pursuant to the fur- [264-G] their authority and instructions of such parents and for and on behalf of such parents did advise the said

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Dr. Donovan that the said parents did not desire that such infant be taken to New York for such operation, that they were desirous that Dr. Donovan perform such operation, in preference to any other physician and surgeon, that money was no object to them in the matter of such proposed employment and that they desired and requested that Dr. Donovan fly to Tucson, Arizona, as soon as possible by airplane, and there perform such operation, regardless of the cost to them; and if it be further assumed that the said Dr. Donovan then and thereupon and as the result of such negotiations made by such agent or agents on behalf of such parents, did undertake such proposed employment as desired and requested by such parents, and did agree that he would fly to Tucson, Arizona, departing from the New York area on April 1, 1939, and that, upon his arrival, he would examine such infant and consult with such attending physicians and that he would thereafter perform such operation, at Tucson, Arizona, as should seem to be needed by such infant; and if it be further assumed that such negotiations were thereupon closed; without any express agreement being discussed or reached as to the amount of fee to be charged by Dr. Donovan, and to be paid by such parents, for such operation, and [264-H] if it be further assumed that on April 1, 1939, and in the course of such employment undertaking, the said Dr. Donovan did leave his New York City office and his practice to be cared for by his agents

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and employees during his absence, did depart from New York City and did fly to Tucson, Arizona; and if it be further assumed that such Dr. Donovan on April 2, 1939, and in the continued course of such employment undertaking, did enter into and conduct consultations with some or all of the said attending physicians of such infant, at Tucson, Arizona, did examine such infant and the x-rays previously mentioned, did gain therefrom the impression that such infant was then suffering from an abnormal condition consisting of mal-rotation of the intestine, with volvulus, and did operate upon such infant at said Desert Sanatorium, Tucson, Arizona, for correction of such condition; and if it be further assumed that the said Dr. Donovan, in the course of performing such operation at such time and place and in the course of his said employment undertaking, did find the pathology to be as follows, namely: That there was no fusion between the gastro-colic omentum and the transverse mesocolon of such infant; that the cecum and the ascending colon of such infant lay in the upper right quadrant of the abdomen; that the small intestine of such infant, beginning at a point about twenty centimeters from where [264-I] the duodenal-jejunal junction should be, was turned to the right, around the root of the mesentery, about two and one-half complete turns; that the lower half of this intestine was blue and completely collapsed; that the terminal ileum of such infant was bound down to its mesentery by

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a definite, firm band which almost completely kinked it; and that the duodenum of such infant instead of taking its normal course passed downwards and emerged from its retroperitoneal position by passing through an opening in the mesentery of the terminal ileum about ten centimeters from the ileocecal junction; and if it be further assumed that the said Dr. Donovan, in the further course of performing such operation at such time and place and in the further course of his said employment undertaking, did enter such infant by and through a right rectus incision, did bring the cecum of such infant down to its normal position, did cut away the band on the ileum of such infant, did then untwist the volvulus by turning all of the small intestine of such infant about two and one-half turns in a counter-clockwise direction, did then attach the cecum of such infant to the perietal peritoneum in the right lower quadrant of the abdomen of such infant by the use of two interrupted sutures of chromic and did then complete such operation by closing the abdomen of such infant in layers; and if it be further assumed that the condition [264-J] of such infant was good at the completion of such operation; and if it be further assumed that such infant was thereupon and immediately transfused and then given a continuing infusion of glucose and saline until such infusion was no longer needed; and if it be further assumed that the said Dr. Donovan, after completing such operation in such manner and

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in the further course of his said employment undertaking, did remain at Tucson, Arizona, in further attendance of such infant, for a period of approximately twenty-four hours after completion of such operation and until it had become apparent to him that the condition of such infant no longer required his specialized care; and if it be further assumed that Dr. Donovan thereupon and in the continued course of his said employment undertaking departed from Tucson, Arizona, and returned to his New York office, traveling by airplane; and if it be further assumed that such operation, performed by the said Dr. Donovan in the aforesaid manner and in the course of his said employment undertaking, was a success, in that such infant survived such operation with apparent normal functioning of the intestinal tract; and if it be further assumed that an x-ray of the intestinal tract of such infant, made on October 1, 1939, indicated that the cecum and colon of such infant were then in normal position; and if it be further assumed [264-K] also that the said Dr. Donovan, for a substantial period of time after his return to New York City, received continuing reports from one of the attending physicians of such infant at Tucson, Arizona, as to such infant's condition, and devoted his time and attention and professional ability to consideration of such reports and to extending his professional advice, as such specialist, to such attending physician; then and under all of such circumstances what, in your

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opinion, would be the reasonable value of such professional services provided by the said Edward J. Donovan to such parents of such infant in the course of such employment?

Mr. Burdeau: The hypothetical question addressed to the witness is objected to upon the following grounds:

1. The said hypothetical question includes and contains immaterial and irrelevant assumptions;

2. The said hypothetical question includes and contains assumptions based upon unsworn statements of third persons not parties to the action;

3. The said hypothetical question requires the witness to draw inferences from the statements of other persons not parties to the action;

4. The said hypothetical question requires the witness to determine what facts are established by the unsworn statements of other persons not parties to the action [264-L] and to take such facts as he so finds into consideration in forming his opinion.

A. \$12,000 to \$15,000.

Mr. Schmidt: You *may* cross-examine, Mr. Burdeau.

Cross Examination

By Mr. Burdeau:

XQ. 78. Doctor, you enumerated some doctors that you regarded as particularly qualified in child surgery. Do you recall the names now of the doctors you mentioned?

A. Donovan; Heeks; Solley.

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XQ. 79. And Dr. Donovan? A. Yes.

XQ. 80. They all were at one time or another connected with Babies Hospital?

A. All connected with it now.

XQ. 81. Are they the only doctors that you regard as competent in that kind of work?

A. No. I said they were the ones that I knew personally.

XQ. 82. They were the ones that you knew personally? A. Yes.

XQ. 83. Is it possible that there are any number of competent surgeons capable of carefully and efficiently performing work of the kind involved in connection with Mr. Jeffcott's child? [264-M]

A. Certainly. I understood this gentleman asked me for my own knowledge.

XQ. 84. You have been a practicing surgeon——

A. I say he asked me for my own knowledge, was the reason I mentioned those that I did.

XQ. 85. I understand; but I don't want you to tell me that there are other competent surgeons unless you know that to be a fact.

A. Oh, I know that to be a fact. I have never seen them operate on babies; but I know their reputation and their writings.

XQ. 86. A man of that type, recognized as a competent surgeon, can successfully perform the kind of operation that Dr. Donovan performed in this case; is not that correct?

A. I would say that was probably correct.

(Deposition of William A. Downes.)

XQ. 87. You have had a long association with Dr. Donovan, haven't you?

A. Since 1920.

XQ. 88. Until 1927, when you retired, you were in active cooperation with him, were you not?

A. He was an assistant at St. Luke's Hospital and at Babies Hospital.

XQ. 89. And that is where you had an opportunity to form your opinion of Dr. Donovan?

A. Yes.

XQ. 90. And you have formed a very favorable opinion of Dr. [264-N] Donovan. A. Yes.

XQ. 91. And most of your testimony here today has been based upon your personal opinion of Dr. Donovan?

Mr. Schmidt: I object to that.

A. He must be recognized as competent.

XQ. 92. I asked you if your testimony was based upon your personal opinion of Dr. Donovan?

A. Yes.

XQ. 93. Do you know the nature of the operation that was performed in this case?

A. Only by Dr. Donovan's mentioning it to me.

XQ. 94. Dr. Donovan called upon you?

A. Oh, well, I have seen him every day when I was in the same office.

XQ. 95. I am talking about the operation on Mr. Jeffcott's child: it was intestinal obstruction due to volvulus? A. Yes.

XQ. 96. Your information as to what this oper-

(Deposition of William A. Downes.)

ation consisted of came from Dr. Donovan, did it?

A. Absolutely.

XQ. 97. Whatever you know about Dr. Donovan's employment in this matter has been related to you by him; is that correct? [264-O]

A. That is correct.

XQ. 98. What has been your relationship with Dr. Donovan since your retirement in 1927?

A. All the people who came to me I referred them to him for advice or operation.

XQ. 99. You had no business arrangement with him? A. No.

XQ. 100. You derived no gain of any kind from that association?

A. None except good will.

XQ. 101. Dr. Donovan arranged to have you testify in this case?

Mr. Schmidt: I stipulate to that.

A. You mean in this present meeting?

XQ. 102. Yes.

A. Yes. I understood it was going to be last spring.

XQ. 103. In reference to the question of operation for the relief of an intestinal obstruction caused by volvulus in an infant, is there any standard charge for that kind of an operation?

A. No. There is no standard charge for any operation, that I know of.

XQ. 104. Charges for the same kind of an operation have a wide range, have they?

(Deposition of William A. Downes.)

A. Very. Conditions guide the price in every instance.

XQ. 105. What factors would you take into consideration in estimating the fairness of another surgeon's charge? [264-P]

A. To begin with, it would depend entirely upon the ability to pay and the social standing of the individual.

XQ. 106. And the skill of the surgeon would be of secondary consideration?

A. We assume that the surgeon is skillful.

XQ. 107. And a doctor need not be what I would call in the vernacular "a top flight surgeon" in order to perform a skillful operation, need he?

A. No.

XQ. 108. And as I understood you to say the social position and financial condition of the patient or the persons employing the surgeon are the primary considerations?

A. I did not say primary. But I think that they are the first considerations. I think the ability of the surgeon is important. And that is the way to gauge the ability of a surgeon; when his record is good.

XQ. 109. Well, the reputation of a surgeon to some degree depends upon his favorable opportunities, doesn't it?

A. Do you mean as a surgeon?

XQ. 110. Yes; I am talking about reputation as distinguished from skill. That depends to some extent upon his favorable opportunities?

(Deposition of William A. Downes.)

A. I would say so, yes. [264-Q]

XQ. 111. And a man may be skillful without having a brilliant reputation? A. Yes.

XQ. 112. I understand you to say that for a particular kind of operation there is no fixed standard for determining what the reasonable charge would be?

A. No, there is not. The only standard anybody has to go by or to act upon is the standard of state compensation, and that is for laboring classes.

XQ. 113. In your opinion, would the fact that Mr. and Mrs. Jeffcott, the parents of the baby involved in this case, employed two or more nurses for its care have any bearing upon the reasonableness of the charge for surgical services in the case?

A. I don't think that would enter into it.

XQ. 114. Has the hypothetical question put to you been discussed by you with Dr. Donovan?

A. The condition was discussed in a general way, some months ago, with Dr. Donovan, but not at all since the hypothetical question was asked.

XQ. 115. If you assume that the infant son of the defendants has never been in a normal condition since the operation performed by Dr. Donovan but that said infant suffers from an open fistula, would that fact make any difference in your opinion as to the value of the services rendered by Dr. Donovan? A. No. [264-R]

XQ. 116. In the hypothetical question put to you you have been asked to assume that "the said Dr.

(Deposition of William A. Downes.)

Donovan in the course of performing his said employment undertaking, did find the pathology to be as follows: namely, that there was no fushion between the gastro-colic omentum and the transverse mesocolon of such infant; that the cecum and the ascending colon of such infant lay in the upper right quadrant of the abdomen; that the small intestine of such infant beginning at a point about twenty centimeters from where the duodenal-jejunal junction should be, was turned to the right around the root of the mesentery about two and one-half complete turns; that the lower half of this intestine was blue and completely collapsed, that the terminal ileum of such infant was bound down to its mesentery by a definite, firm band which almost completely kinked it; and that the duodenum of such infant instead of taking its normal course passed downwards and emerged from its retroperitoneal position by passing through an opening in the mesentery of the terminal ileum about ten centimeters from the ileocecal junction." All this means in plain English is that the child had an intestinal obstruction due to a kinking or twisting, does it not?

A. Intestinal obstruction is a grave condition which requires expert surgery, especially when it is of [264-S] congenital nature.

Mr. Burdeau: That is all.

[Title of District Court and Cause.]

DEPOSITION OF CARL G. BURDICK.

State of New York

County of New York—ss.

Deposition of Carl G. Burdick taken pursuant to the annexed notice dated at Tucson, Arizona, the 12th day of November, 1941, as a witness on behalf of the plaintiff in the above entitled action, before Albert Gerber, a duly appointed and qualified notary public of the State of New York for the county of New York, at the office of the said Carl G. Burdick, No. 140 East 54th Street, Borough of Manhattan, City, County and State of New York, beginning at 11 a.m. on the 3rd day of December, 1941, to which time and [264-T] place the taking of said deposition was adjourned by consent of counsel for the respective parties herein.

Appearances:

ARTHUR T. SCHMIDT, Esq.,
Attorney for the plaintiff.

FRUEAUFF, BURNS & RUCH, Esqrs.,
By JOSEPH A. BURDEAU, Esq.,
Of counsel for the defendants.

CARL G. BURDICK,
of lawful age, duly sworn as a witness on behalf
of the plaintiff, testified as follows:

Direct Examination

By Mr. Schmidt:

Q. 1. What is your name, doctor?

(Deposition of Carl G. Burdick.)

A. Carl G. Burdick.

Q. 2. Where do you reside?

A. I am residing at Wilton, Connecticut.

Q. 3. Do you have an office at 140 East 54th Street? A. Yes.

Q. 4. What is your profession, doctor?

A. Surgeon.

Q. 5. When and where were you admitted to practice as a physician and surgeon?

A. 1907. In New York State.

Q. 6. What schools did you attend in preparing for the practice of such profession?

A. I was graduated from Columbia Medical School. I did [265] *did* not go to college before that. I went to high school. I went from high school into medical school. I graduated in 1903.

Q. 7. That was known as the College of Physicians and Surgeons?

A. The College of Physicians and Surgeons, yes.

Q. 8. Run under the auspices of Columbia University? A. Yes.

Q. 9. How long were you in attendance at that school, doctor? A. Four years.

Q. 10. What degree, if any, did you receive from that school? A. M. D.

Q. 11. When did you have any other and special training which was designed to fit and prepare you for the practice of such profession?

A. I spent two years as an interne at the New

(Deposition of Carl G. Burdick.)

York Hospital; six months as an interne at St. Mary's Hospital for Children; and four months as an interne at the Lying-in Hospital.

Q. 12. And that was all prior to what year?

A. Prior to 1907.

Q. 13. Are you a member of any professional organizations in which admission to membership depends upon demonstration of special professional qualifications or accomplishments?

A. I suppose you may call those the American College of Surgeons, the American Board of Surgery, the New York Surgical Society, and the American Surgical Association. [266]

Q. 14. And you are a member of all of those?

A. Yes.

Q. 15. And do they call for any special demonstration of professional qualifications for admission? A. The New York Surgical Society——

Mr. Burdeau: I object to that. It calls for a conclusion, and does not enumerate specifically what qualifications are regarded as special.

Q. 16. Doctor, the American Surgical Society is an honorary society, is it not?

A. It is a society which is comprised of 150 or 175 members, I don't remember which. It may be 175 surgeons, in the United States and Canada; they are picked out presumably for their eminent qualifications in surgery. I might say that it is the outstanding surgical association in this country.

Q. 17. And, from the whole of the United States

(Deposition of Carl G. Burdick.)

and Canada, the number of members is limited in that association to 175?

A. I think it is 175. I think they have pushed it up to 175. It used to be 150.

Q. 18. Doctor, will you please state fully the nature and extent of your past experience in the practice of your profession.

A. I have been connected with a number of hospitals, but I have been connected with Bellevue since 1909. I [267] retired this fall. Beginning as an assistant, then for a time, I guess for six years, I was in charge of the children's surgical service at Bellevue, then in 1925 I was made director of the fourth surgical division, a position which I held until just this fall. There are four divisions at Bellevue, just like four different hospitals really. I was head of the fourth division. And I have been connected with the Hospital for the Ruptured and Crippled.

Q. 19. In what capacity were you connected with the Hospital for the Ruptured and Crippled?

A. I started there as an assistant; and I have been visiting surgeon and what they call chief of the surgical service. I was made that about six or eight years ago.

Q. 20. And you still are that, doctor?

A. I am still that there.

Q. 21. Chief of the surgical service of the Hospital for the Ruptured and Crippled in New York City?

(Deposition of Carl G. Burdick.)

A. Yes. Then I have been connected with other hospitals throughout my limited career.

Q. 22. For how many years past have you specialized solely in surgery, doctor?

A. I have never done anything but surgery since I started to practice.

Q. 23. To what extent in the course of your professional training and practice have you become familiar with [268] surgery incident to intestinal obstruction in the newborn due to volvulus?

A. At Children's Surgical Service at Bellevue, we see a certain number of those cases down there. In fact, however, we do not happen to see as many down there, for instance, as they see at Babies Hospital.

Mr. Burdeau: Could I interpose there to put one question?

Mr. Schmidt: Yes.

By Mr. Burdeau:

Q. 24. Could you give me a rough estimate of the number of such cases a year that you saw at Bellevue?

A. No. As I say, we do not see so many of them down there. Just why, I cannot say; but the fact remains that we do not.

By Mr. Schmidt:

Q. 25. Would that indicate to you from your experience that it is a rather rare and special condition?

A. It is that. And I think that certain hospitals

(Deposition of Carl G. Burdick.)

have a reputation for doing those things and those cases are more apt to be sent there.

Q. 26. To what extent in the course of your professional training and practice have you become familiar with general surgical conditions of infancy and childhood?

A. Of course, I was at the head of the children's [269] surgical service at Bellevue, that is, I started there when it was formed as an entity, which was in 1916, I was assistant, then after the war I was made visiting surgeon in charge, and I was in charge of that service until about 1930. I would say that I was fifteen years connected with the children's surgical service, which dealt exclusively with the surgery of children.

Q. 27. How does the surgical operation for the correction of intestinal obstruction in the newborn due to volvulus compare in difficulty of performance to other surgical operations for the correction of other serious conditions of infancy and childhood?

Mr. Burdeau: That I object to as purely speculative and indefinite; the comparison of one, with something indefinite and uncertain.

Q. 28. Doctor, before you answer that question let me ask you: From your experience is it possible to compare the difficulty of performance of a surgical operation for that type of intestinal obstruction in a child due to volvulus, with other operations to correct serious conditions of infancy in childhood?

(Deposition of Carl G. Burdick.)

A. I would say that intestinal obstruction in the upper part of the bowel in infants, in the first place, is a comparatively rare condition; and, in the second place, a condition that not very many surgeons are [270] qualified to cope with.

Q. 29. So your answer to my last question is that you can compare the difficulty between those two types of operation?

A. I would say, for instance—take myself, for example: I have seen a lot of intestinal conditions in children, that is, obstruction lower down, intussusception; but so far as obstruction of the upper part of the small bowel, the duodenum, and so on, we just haven't had them down at Bellevue.

Q. 30. And because of the rarity of their appearance would you say, from your experience, that they call for an operation of a specially serious nature?

Mr. Burdeau: I object to that.

Mr. Schmidt: As to form?

Mr. Burdeau: No. I object to it because it is a comparison of one definitive, with anything within the range of possibility in the shape of abnormal conditions requiring surgery.

Mr. Schmidt: Will you answer it, then, doctor?

The Witness: I would like the question again.

(Q. 30 repeated by the reporter.)

A. I would not answer that quite that way, if I may have that liberty. I would say that they are serious, [271] yes, but that they require a particularly

(Deposition of Carl G. Burdick.)

qualified man—if you see what I mean. I would not say that possibly, with a qualified man, that operation was any more serious than another one: but you have got to have a man that has had certain experience in that line. Is that clear?

Mr. *Burdick*: That is perfectly clear to me, doctor.

Q. 31. How does such operation for correction of such obstruction compare in probability of success and recovery of patient to operations for correction of other serious conditions of infancy and childhood?

Mh. *Burdeau*: I object to that, on the same ground.

A. You see, “other serious conditions” is indefinite.

Mr. *Schmidt*: I will withdraw the question. I see your point.

Q. 32. How does such operation compare in difficulty of performance to some of the more serious operations which surgeons perform in cases of children of more advanced age or in cases of adults?

Mr. *Burdeau*: I object to that because it is a comparison of one definite operation with a class of operations which you describe as “serious” [272] in nature without specifying what operations you have in mind.

A. I would say that it is a more delicate operation to perform.

Mr. *Burdeau*: Could I intervene there just a minute. More delicate than what, doctor?

(Deposition of Carl G. Burdick.)

The Witness: That is the point. He spoke about conditions in older children. Now, for instance, you might say a strangulated hernia or volvulus or an acute appendix or an abdominal tumor, if you want to consider those different things as comparative I would say, just as I said before, that it is a more delicate operation to perform; the younger the baby is, the smaller the parts are, the more gently the tissues must be handled.

Q. 33. Let me phrase the question this way, then. How does such operation for intestinal obstruction due to volvulus, performed upon a child of a few days of age—five or six or eight days of age—compare with a similar condition, on children or more advanced ages?

A. I would say it was more difficult.

Q. 34. How does such operation compare, in probability of success and in probability of recovery of the patient, to a similar operation performed by surgeons upon [273] children of more advanced ages or upon adults?

A. You would not get a similar operation upon children of advanced age. If they were not operated upon, they would not live to an advanced age.

Mr. Burdeau: Could I ask a question just for my enlightenment?

Mr. Schmidt: Surely.

By Mr. Burdeau:

Q. 35. Is this condition which is the subject of this action a congenital condition? Is a child born that way? A. Yes.

(Deposition of Carl G. Burdick.)

Q.36. Oh, then, that makes it easier to understand.

A. Yes. That is why I say that a child would not grow up unless he was operated on.

Mr. Burdeau: Then I understand.

By Mr. Schmidt:

Q.37. That is, if such a child were not operated on, the child would die?

A. Yes, exactly.

Q.38. To what extent, if you know, must a surgeon have specialized training, experience and skill in the performance of such operation for correction of intestinal obstruction in the newborn due to volvulus in order that such surgeon may be expected to perform such operation with high degree of probability that the condition [274] will be corrected and that the patient will recover?

Mr. Burdeau: I object to that, as calling for conclusions. But the answer goes in, of course?

The Witness: Do you want me to answer it?

Mr. Schmidt: Yes.

The Witness: Now give it to me over again.

(Q. 38 repeated by the reporter.)

A. Obviously, he must be a man who has had a considerable experience in that type of surgery.

Q.39. What surgeon or surgeons of the State of New York, if you know, had had sufficient special and outstanding training and experience, on April 1, 1939, or thereabouts, to prepare and fit him or them to perform such operation for correc-

(Deposition of Carl G. Burdick.)

tion of intestinal obstruction in the newborn due to volvulus with high degree of probability that the patient will recover?

A. Do you mean you want me to name a group of men?

Q. 40. How many were there?

A. That is a large order. In the first place, I may not be familiar with all the men who are competent to do it.

Q. 41. How many would you know, would you say?

A. We are talking about Donovan; I would mention him. But I would mention perhaps a man by the name of Touroff. This is when; what year?

Q. 42. 1939.

A. I would mention a man by the name of Touroff, who is [275] up at Mt. Sinai. I might mention Charley Farr, who was over at St. Mary's for many years. There are not so many men who have had training preeminently fitting them for this type of operation in infants.

Q. 43. Did I understand you, doctor, to say that you mentioned Dr. Donovan in that?

A. Yes, I mentioned Donovan as chief of the Babies Hospital. And there may be one or two others. I do not think there would have been anybody else up there who would have had the training. You see, there are not so many hospitals in New York that you might say specialize in surgery of infants. You take, now, our service down at

(Deposition of Carl G. Burdick.)

Bellevue, I would not say that any of us down there had had enough experience in that type of surgery to make us eminently qualified—now, we could probably do it; but take myself; I would rather feel that somebody who had seen some of those cases was better qualified than I was.

Q. 44. Let me ask you, doctor, is Dr. Donovan, the plaintiff in this case, generally regarded among the members of the New York medical profession as a surgeon highly qualified to perform that type of operation?

A. I think he is, without any question.

Q. 45. Would you say that he was regarded by the medical profession as one of the most eminent in the city? A. I would say so, yes.

Q. 46. Do you know how the medical profession regards to [276] eminence of Dr. Donovan in that special field insofar as the other surgeons of the United States are concerned?

A. I would say that Donovan had had as much experience in that type of surgery as anybody, to my knowledge, in this country. Now, in Boston, there is Ladd, at the head of the children's surgical service at the Children's Hospital; he is a little older than Donovan, but I don't believe he has seen any more of those cases than Donovan has. And some of the other men I am not so familiar with.

Q. 47. Have you had an opportunity in the course of your years of practice as a physician and surgeon to know from time to time the basis upon

(Deposition of Carl G. Burdick.)

which more prominent and higher ranking physicians and surgeons in New York City determine the fees which they charge for surgical operations?

A. I know what I charge; how I base it myself. I cannot tell what the other fellows do.

Q. 48. In the course of your own experience, as to the fees which you have charged from time to time for surgical operations, do you know how such fees have been generally regarded by the other members of the medical profession in New York City?

Mr. Burdeau: I object to that as utterly immaterial: going into the question of this doctor's compensation. [277]

The Witness: Give me the gist of that again.

Q. 48 repeated by the reporter.

A. "Such fees": I do not get you there. I don't know what that means.

Mr. Schmidt: I withdraw the question. I know what your objection is to it, Mr. Burdeau.

Q. 49. Have you had the opportunity as a result and in the course of your years of practice as a surgeon to learn and know the amount of fees arrived at by other prominent and able surgeons who give specialized attention to surgical conditions of infancy, for performing the operation for correction of intestinal obstruction in the newborn, due to malrotation of the intestines, with volvulus?

Mr. Burdeau: I object to that, as immaterial and irrelevant.

(Deposition of Carl G. Burdick.)

Mr. Schmidt: Not as to form, I take it.

Mr. Burdeau: No.

A. I would say that I have not had any definite knowledge of what other men charge: if that is what you mean.

Q. 50. Have you had the opportunity in the course and by virtue of your years of practice as a surgeon to learn and to know what has been the practice from [278] time to time of very prominent and very able surgeons of New York City, in fixing the amount of fee to be charged for specialized operations in cases where they have been called upon to leave their offices and practices in New York and to go to distant points within the United States to perform such operations? A. Yes.

Q. 51. What has been such practice?

A. I would say that the practice depends on, first, the financial status of the patient or the family of the patient involved; the seriousness of the operation; and possibly the amount of time that a man has had to spend in preparing himself to become competent in that type of operation.

Q. 52. But would you say, doctor, that there would be a different fee ordinarily charged for an operation performed by a New York doctor in New York City, and that which he would charge when he had to go to some distant place?

A. Oh, surely: there is no question about that.

Q. 53. And would that be higher or lower?

A. It would be higher.

(Deposition of Carl G. Burdick.)

Q. 54. And what has been the general attitude, if you know, of the members of the medical profession towards such practice on the part of such surgeons with reference to approving or disapproving such practice, [279] that is, the practice of charging a higher fee for going to a distant point?

A. Oh, that is perfectly reasonable.

Q. 55. They approve or they disapprove it?

A. They approve it.

Q. 56. Now, doctor, have you had the opportunity in the course of your own professional practice to learn and to know what has been the custom from time to time of prominent and able New York surgeons in going to distant points and there performing specialized operations, on the matter of returning the patient to the care of local physicians and surgeons as soon after the operation as the patient indicates the termination of the need for specialized care? A. Yes.

Q. 57. They do that? A. Yes.

Q. 58. And was that the custom on or about April 1, 1939? A. Yes.

Q. 59. And what, if you know, has been the general attitude of the members of the medical profession relative to approving or disapproving such custom? A. They approve it.

Q. 60. Have you become familiar with and are you able based upon your past training and experience as a physician and surgeon, and based upon your professional knowledge of what constitutes the

(Deposition of Carl G. Burdick.)

reasonable value of the pro- [280] fessional service of a physician and surgeon, to form and express an opinion as to the reasonable value of the professional services of any prominent and eminently qualified surgeon of the City of New York in performing a specialized surgical operation when you know the following facts, namely, the background of such physician and surgeon in schooling, training and experience; the particular qualifications of such surgeon to perform such specialized operation; the nature of the negotiations by which such surgeon was employed to perform such specialized operation; the means by which such surgeon traveled to and from the point of performing such operation and the length of time during which such surgeon was required to be absent from his New York City office and away from his New York practice in going to the place of the operation, in performing the operation, in remaining with the patient following the operation and in returning to New York City; the time and place at which such operation was performed; the age of the patient at the time of the operation; the personal history of such patient; the results of physical examinations of the patient by physicians and surgeons; the clinical findings, and other pertinent information concerning the patient which might indicate the nature of such specialized operation; the manner in which such operation was performed by such physician and [281] surgeon; the facts and circumstances which indicate

(Deposition of Carl G. Burdick.)

whether the operation was or was not successful, and the facts and circumstances tending to indicate whether or not the patient should be reasonably expected to recover; knowing all that, doctor, are you from your past experience in a position to form and express an opinion as to the reasonable value of the professional services of such a surgeon?

A. Yes.

Q. 61. If it be assumed that Dr. Edward J. Donovan, who maintains offices at 862 Park Avenue in the city and state of New York, after completion of the usual pre-college schooling, attended the College of Physicians and Surgeons of Columbia University from 1917 to 1920, graduated with the degree of M. D., and was elected to Alpha Omega Alpha Society, which is the medical honor society; and if it be further assumed that said Dr. Donovan, following such schooling, was duly licensed by the State of New York and admitted to practice as a physician and surgeon on or about the 1st day of June, 1921; and if it be further assumed that Dr. Donovan served six months as Assistant Resident Surgeon at Mary McClelland Hospital at Cambridge, New York, and served two years surgical internship at St. Luke's Hospital of New York City from January 1, 1921, to January 1, 1923, and served four months as Resident Surgeon at Lying-In Hospital in [282] New York City, and that during the first year of practice received appointments as assistant attending surgeon at Babies Hospital

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of New York City, and at St. Luke's Hospital of New York City, and at St. Luke's Hospital of New York City, and during such service continuing to 1926 he did a great part of the emergency surgery in both institutions, and that in 1926 he was promoted to associate attending surgeon in both the Babies Hospital and St. Luke's Hospital in New York City and in 1926 was appointed as assistant professor of surgery of the College of Physicians and Surgeons of Columbia University in New York City, and is still so acting, and in or about the same time he was made a Fellow of the American College of Surgeons, and in 1929 was elected to membership in the New York Surgical Society, and in 1930 he was made Surgeon in Chief of the Babies Hospital, one of the units of the Medical Center of Columbia University, at which hospital all children up to the age of twelve years from the Medical Center are cared for, and that he was at about the same time made a full attending surgeon, which is the highest rank given at St. Luke's Hospital, *at St. Luke's Hospital*, and together with an associate surgeon was placed in charge and still is in charge of one of the surgical services in said hospital, and that about 1930 he was made and is still acting as consulting [283] surgeon at the Yonkers General Hospital at Yonkers, New York, at Northern Westchester Hospital at Mt. Kisco, New York, and at Fitkin Memorial Hospital at Asbury Park, New Jersey, and that in 1936 he was elected to member-

(Deposition of Carl G. Burdick.)

ship in the American Surgical Association, which is a national honorary society whose membership in the United States is limited to one hundred seventy-five surgeons; and assuming further that during the first seven years of practice he engaged in a general practice and surgery at the Babies Hospital and St. Luke's Hospital of New York City, and that during the past twelve years his practice has been devoted exclusively to surgery, and that during the past ten years he has written many articles on abdominal surgery, and has written a chapter on infant surgery published in "Christopher's Textbook of Surgery," which book is used in a great many medical schools throughout the country, and that he has written a chapter in Nelson's Looseleaf Surgery, on Pyloric Stenosis in infancy, which text book is the most modern standard reference text book in use in the United States, and that he collaborated in panel discussions on intestinal obstructions in infancy at the meeting of the American College of Surgeons in 1939, and at the meeting of the Academy of Pediatrics in Boston in 1941; and if it be further assumed that on or about the 1st day of May, 1923, Dr. Donovan [284] established private offices in the City of New York and began there to carry on the practice of his profession as a physician and surgeon, giving specialized attention to surgical conditions of infancy and childhood; and if it be further assumed that Dr. Donovan thereafter continued and now continues to

(Deposition of Carl G. Burdick.)

carry on such specialized professional practice; and if it be further assumed that by April 1, 1939, Dr. Donovan had attained a position of very high standing in the ranks of his profession and was then generally regarded by physicians and surgeons as being one of the very few physicians and surgeons of the United States who had acquired national prominence due to outstanding and eminent qualifications and success in such specialized field of practice of the medical profession; and if it be further assumed that, on or about said 1st day of April, 1939, Dr. Donovan had had a very high and outstanding degree of experience in performance of operations for correction of intestinal obstruction in infants due to malrotation of the intestine, volvulus and other related abnormalities; and if it be further assumed that, on or about April 1, 1939, Dr. Donovan was generally regarded by physicians and surgeons of the United States as then being very highly qualified by his training and experience, to perform surgical operations for the correction of intestinal obstruction in the newborn due to malro- [285] tation of the intestine, with volvulus; and if it be further assumed that Robert J. Jeffcott, infant son of David C. Jeffcott and Elsie Jeffcott, his wife, the defendants in this action in which your testimony is being taken, was delivered at Desert Sanatorium, located at Tucson, Arizona, on March 24, 1939; and if it be further assumed that beginning shortly after birth it was apparent to the

(Deposition of Carl G. Burdick.)

physicians and surgeons of Tucson, Arizona, who were then attending such infant, that the said Robert J. Jeffcott was suffering from some abnormal condition; and if it be further assumed that, beginning on the fifth day of life of such infant, it became and was apparent to such attending physicians that a partial obstruction of the intestinal tract of such child was present; and if it be further assumed that following the taking of gastrointestinal x-rays of such infant on March 31, 1939, it was the impression of such attending physicians that it was necessary that a surgical operation be performed for the correction of such abnormal conditions of such infant; and if it be further assumed that the said defendants in such action, namely, the said David C. Jeffcott and Elsie Jeffcott, his wife, parents of such infant, were then advised by such attending physicians of the presence of such abnormal condition of such newborn child, of the apparent necessity for such surgical operation and of the [286] seriousness thereof; and if it be further assumed that such parents were thereupon also advised by such attending physicians as to the respective and comparative qualifications, for the performing of such operation, of Dr. Edward J. Donovan and of one or two other physicians and surgeons of the United States, all having national prominence in regard to and as the result of carrying on their professional practice with specialized attention to surgical conditions of infancy and childhood; and

(Deposition of Carl G. Burdick.)

if it be further assumed that the said parents of such infant then and thereupon decided that they desired to employ the said Dr. Donovan to perform such operation, making such decision because of Dr. Donovan's high qualifications and his unusual degree of experience, for correction of intestinal obstruction of the newborn child, then apparently needed by their infant son; and if it be further assumed that such parents, then and thereupon, authorized and instructed one or more of such attending physicians to act on their behalf, as their agent or agents, in negotiating with and employing the said Dr. Edward J. Donovan to perform such operation on their infant son; and if it be further assumed that such agent or agents of such parents then and thereupon pursuant to such authority and instructions communicated to the said Dr. Donovan the information concerning the apparent con- [287] dition of such infant, the information concerning the desire of such parents to employ said Dr. Donovan to perform such operation and such information as Dr. Donovan desired and requested, concerning the parents of such infant, to aid him in deciding whether or not to accept such employment; and if it be further assumed that such agent or agents of such parents in the course of such negotiations for the employment of said Dr. Donovan advised him that it was the desire of such parents that such operation be performed as soon as possible; and if it be further assumed that in the

(Deposition of Carl G. Burdick.)

course of such negotiations between such physician and the said agent or agents, the said Dr. Donovan indicated that such infant could be brought to New York City by airplane and that he would perform the desired operation as soon as possible after arrival of such infant at such city; and if it be further assumed that such parents of such infant were then advised by such agent or agents of such tentative negotiations of such desired employment; and if it be further assumed that such agent or agents then and thereupon and in the further course of such negotiations and pursuant to the further authority and instructions of such parents and for and on behalf of such parents did advise the said Dr. Donovan that the said parents did not desire that such infant be taken to New York for [288] such operation, that they were desirous that Dr. Donovan perform such operation, in preference to any other physician and surgeon, that money was no object to them in the matter of such proposed employment and that they desired and requested that Dr. Donovan fly to Tucson, Arizona, as soon as possible by airplane, and there perform such operation, regardless of the cost to them; and if it be further assumed that the said Dr. Donovan then and thereupon and as the result of such negotiations for his employment and relying upon such representations made by such agent or agents on behalf of such parents, did undertake such proposed employment as desired and requested by such parents, and did

(Deposition of Carl G. Burdick.)

agree that he would fly to Tucson, Arizona, departing from the New York area on April 1, 1939, and that, upon his arrival, he would examine such infant and consult with such attending physicians and that he would thereafter perform such operation, at Tucson, Arizona, as should seem to be needed by such infant; and if it be further assumed that such negotiations were thereupon closed, without any express agreement being discussed or reached as to the amount of fee to be charged by Dr. Donovan, and to be paid by such parents, for such operation; and if it be further assumed that on April 1, 1939, and in the course of such employment undertaking, the said Dr. Donovan did leave his New [289] York City office and his practice to be cared for by his agents and employees during his absence, did depart from New York City and did fly to Tucson, Arizona; and if it be further assumed that such Dr. Donovan on April 2, 1939, and in the continued course of such employment undertaking, did enter into and conduct consultations with some or all of the said attending physicians of such infant, at Tucson, Arizona, did examine such infant and the x-rays previously mentioned, did gain therefrom the impression that such infant was then suffering from an abnormal condition consisting of malrotation of the intestine, with volvulus, and did operate upon such infant at said Desert Sanatorium, Tucson, Arizona, for correction of such condition; and if it be further assumed that the said Dr. Donovan, in the course of

(Deposition of Carl G. Burdick.)

performing such operation at such time and place and in the course of his said employment undertaking, did find the pathology to be as follows, namely: that there was no fusion between the gastrocolic omentum and the transverse mesocolon of such infant; that the cecum and the ascending colon of such infant lay in the upper right quadrant of the abdomen; that the small intestine of such infant, beginning at a point about twenty centimeters from where the duodenal-jejunal junction should be, was turned to the right, around the root of the mesentery, about two and one-half [290] complete turns; that the lower half of this intestine was blue and completely collapsed; that the terminal ileum of such infant was bound down to its mesentery by a definite, firm band which almost completely kinked it; and that the duodenum of such infant instead of taking its normal course passed downwards and emerged from its retroperitoneal position by passing through an opening in the mesentery of the terminal ileum about ten centimeters from the ileocecal junction; and if it be further assumed that the said Dr. Donovan, in the further course of performing such operation at such time and place and in the further course of his said employment undertaking, did enter such infant by and through a right rectus incision, did bring the cecum of such infant down to its normal position, did cut away the band on the ileum of such infant, did then untwist the volvulus by turning all of the small

(Deposition of Carl G. Burdick.)

intestine of such infant about two and one-half turns in a counter-clockwise direction, did then attach the cecum of such infant to the parietal peritoneum in the right lower quadrant of the abdomen of such infant by the use of two interrupted sutures of chromic and did then complete such operation by closing the abdomen of such infant in layers; and if it be further assumed that the condition of such infant was good at the completion of such operation; and if it be further assumed that such [291] infant was thereupon and immediately transfused and then given a continuing infusion of glucose and saline until such infusion was no longer needed; and if it be further assumed that the said Dr. Donovan, after completing such operation in such manner and in the further course of his said employment undertaking, did remain at Tucson, Arizona, in further attendance of such infant, for a period of approximately twenty-four hours after completion of such operation and until it had become apparent to him that the condition of such infant no longer required his specialized care; and if it be further assumed that Dr. Donovan thereupon and in the continued course of his said employment undertaking departed from Tucson, Arizona, and returned to his New York office, traveling by airplane; that if it be further assumed that such operation, performed by the said Dr. Donovan in the aforesaid manner and in the course of his said employment undertaking, was a success, in that such infant survived such operation with apparent nor-

(Deposition of Carl G. Burdick.)

mal functioning of the intestinal tract; and if it be further assumed that an x-ray of the intestinal tract of such infant, made on October 1, 1939, indicated that the cecum and colon of such infant were then in a normal position; and if it be further assumed also that the said Dr. Donovan, for a substantial period of time after his return to New [292] York City, received continuing reports from one of the attending physicians of such infant at Tucson, Arizona, as to such infant's condition, and devoted his time and attention and professional ability to consideration of such reports and to extending his professional advice, as such specialist, to such attending physician;

Then, and under all of such circumstances what, in your opinion, would be the reasonable value of such professional services provided by the said Dr. Edward J. Donovan to such parents of such infant in the course of such employment?

Mr. Burdeau: The hypothetical question addressed to the witness is objected to on the following grounds;

(1) The said hypothetical question includes and contains immaterial and irrelevant assumptions;

(2) The hypothetical question includes and contains assumptions based upon the unsworn statements of third persons not parties to this action;

(3) The hypothetical question requires the witness to draw inferences from the statements of other persons not parties to the action;

(4) The hypothetical question requires the wit-

(Deposition of Carl G. Burdick.)

ness to determine what facts are established [293] by the unsworn statements of other persons not parties to the action; and to take such facts as he so finds into consideration in forming his opinion; and

(5) Upon the ground that one of the assumptions contained in said hypothetical question is based upon a conclusion as to the mental operations of the defendants in employing the plaintiff.

Mr. Schmidt: What conclusion do you refer to, Mr. Burdeau? Maybe we can correct that portion of it.

Mr. Burdeau: (Reading) “* * * and if it be further assumed that said parents of such infant then and thereupon decided that they desired to employ the said Dr. Donovan to perform such operation, making such decision because of Dr. Donovan’s high qualifications and his unusual degree of experience.”

Mr. Schmidt: Let me amend the hypothetical question to read: “and such parents stating that they had made such decision because of Dr. Donovan’s high qualifications and his unusual degree of experience.”

Mr. Burdeau: In that case, the last objection is withdrawn. [294]

Mr. Schmidt: Now we will have the answer, doctor, if you will give it.

A. I should say somewhere between \$10,000 and \$15,000.

Mr. Schmidt: That is all.

(Deposition of Carl G. Burdick.)

Cross Examination

By Mr. Burdeau:

XQ. 62. Dr. Burdick, this condition about which you have been questioned is not a condition found only in infants born in New York or Boston, is it?

A. No, it is not.

XQ. 63. You would find it in Philadelphia?

A. Yes.

XQ. 64. St. Louis? A. Yes.

XQ. 65. New Orleans? A. Yes.

Mr. Schmidt: I will stipulate that.

Mr. Burdeau: Let me ask the question.

Mr. Schmidt: I thought I would save time.

XQ. 66. And wherever that condition arises it requires an operation? A. Yes.

XQ. 67. Do you mean to say that there are no qualified men to perform that operation in Philadelphia, St. Louis, Chicago, New Orleans? [295]

A. No, I do not mean to intimate that at all. I said that undoubtedly there are men throughout the country that I am not familiar with.

XQ. 68. That you are not familiar with?

A. Yes.

XQ. 69. So that because their reputations have not reached New York does not by any means indicate that there are not competent surgeons who can perform that operation?

A. Oh, absolutely.

XQ. 70. And in the hospitals in New York other

(Deposition of Carl G. Burdick.)

than Bellevue, there are babies' departments, are there not?

A. Well, there are not so many. Of course, I say the Babies Hospital is preeminent. There used to be St. Mary's Hospital for Children; now, they did not take babies—they started to two years ago. Now our service down at Bellevue is one of the best services for children, and why we do not see as many of these cases as they see at Babies Hospital I do not know. We have always wondered why we did not; but we just do not, that is all. Now, up at Mount Sinai, they have a good children's service. Offhand, it would be hard for me to think of another specialized hospital for babies. Do you see what I mean? All of these hospitals treat babies; but they do not get enough volume of work to get the experience. That is the point I am trying [296] to bring out.

XQ. 71. You have as I understand it emphasized the necessity of special experience and special training to enable a surgeon to perform this operation competently. A. Yes.

XQ. 72. Is that correct?

A. That is right.

XQ. 73. What do you mean by special experience and special training? Must he have had a large number of precisely the same kind of operations?

A. I would say that the more of those cases a man has seen the more competent he would be to perform any particular operation.

XQ. 74. Yes.

(Deposition of Carl G. Burdick.)

A. Or I would say almost this, that the more competent he would be in the first place to diagnose it—which is not so difficult; and in the second place to get in there and run up against various kinds of complications and be able to meet the situation in each one of them: do you see what I mean?

XQ. 75. I do. Doctor, are there other intestinal or abdominal conditions in newly born children that require operations?

A. Well, they are chiefly in the upper abdomen. Of course there are others. For instance, there is a lack of development of the lower bowel, where [297] you have what we call an imperfect anus: in other words, the baby's bowels cannot move. Now, that is a condition that we see.

XQ. 76. Is the condition that we have been talking about here, which I will briefly describe as intestinal obstruction due to volvulus, the only condition except the condition you have just mentioned—imperfect anus—that requires surgery in a newly born child?

A. No, I would not say that. But I would say that it was probably lesions in the upper abdomen. You take pyloricstenosis, and obstruction of the duodenum, and what we call nonrotation—which causes volvulus—I would say that those are the three things that you meet most frequently in infants.

XQ. 77. Those are of course mechanical defects in the intestines, are they not?

(Deposition of Carl G. Burdick.)

A. They are mechanical, yes.

XQ. 78. Are there not any pathological conditions that require surgery in a newly born child?

A. Yes; you might call those pathological.

Mr. Schmidt: Are you limiting this to the abdomen?

Mr. Burdeau: The intestines and the abdominal region. I withdraw the question, and rephrase it.

XQ. 79. I differentiate between a condition such as we have been talking about—obstruction due to volvulus— [298] and a condition of the intestines due to some diseases in the newly born child.

A. Well, you do not see many of those, due to disease in a newborn infant. In fact, I could not recall, offhand—

XQ. 80. I do not, myself. I am asking you.

A. —anything that you see in a baby.

XQ. 81. Then the surgeon who holds himself out as a specialist in the branch of surgery concerned with intestinal surgery in newly born children has only about one operation he can look for, and that is the operation to relieve obstruction due to volvulus; is that it?

A. I do not quite get your inquiry. Do you mean to say that one man poses as only operating in that condition?

XQ. 82. I am trying to get you to tell me any other conditions of a first-class, well experienced child's surgeon would ordinarily be prepared to encounter?

(Deposition of Carl G. Burdick.)

A. A surgeon who has had you might say a large and extensive experience in children's surgery would naturally be able to cope with various conditions in children. But I would say this, that there are certain men who have had more experience along certain lines. Now, for instance, take myself——

XQ. 83. I understand all that.

A. Take myself, I have done a lot of cleft palate sur- [299] gery; I have probably done as much cleft palate surgery as anybody in New York City. Now, while I know a moderate amount about children's surgery, I would say that I had had an unusual experience in cleft palate surgery. That is what I am trying to bring out.

XQ. 84. To pursue my line of examination; cleft palate is not the only abnormal condition that you would find in a person's mouth?

A. Absolutely not.

XQ. 85. That is what I am trying to get at with respect to an infants intestines and abdomen. This condition of obstruction due to volvulus is not the only abnormal condition that a surgeon would expect to find there?

A. Absolutely not. There is no question about that.

XQ. 86. So that a man engaged in child's surgery can look for many other conditions requiring surgery; is not that correct?

A. Oh, yes; that is perfectly correct.

(Deposition of Carl G. Burdick.)

XQ. 87. And those conditions require the opening of the abdomen wall? A. Yes.

XQ. 88. That is a serious operation, too, isn't it?

A. I suppose it really is.

XQ. 89. I mean to say, doctor, this particular operation involved in this case is not the only serious operation that can be performed—— [300]

A. Oh, absolutely not.

XQ. 90. Throughout the United States infants are born every day that require abdominal surgery, intestinal surgery? A. Yes.

XQ. 91. And, somehow or other, there are competent men on hand to do it; is not that so?

A. I expect there must be. On the other hand, I would say that there are more competent men in the larger centers, like New York, Boston, Philadelphia, St. Louis, Chicago, and so on.

XQ. 92. Well, the population is bigger in those towns?

A. The men there are the men who see enough cases to get the experience.

XQ. 93. Right.

A. That is the point.

XQ. 94. But do you think that the men outside of New York—from Boston—lose more cases through surgery than the men in New York?

A. Now, listen: I am not holding New York up as a paragon.

XQ. 95. I will withdraw it. Will you repeat the factors you would take into consideration in form-

(Deposition of Carl G. Burdick.)

ing your opinion of the reasonable value of another surgeon's services?

A. I have forgotten what I said before. But I would say that it depended on the seriousness of the oper- [301] ation, the technical skill which it required to perform the operation, and the financial ability of the patient's parents to pay. When a person comes in here I tell them an operation is worth what you are able to pay for it.

XQ. 96. That was not the order in which you stated those factors when you answered the question on direct examination.

A. I don't remember how I stated it.

XQ. 97. Let me refresh your memory then. Is it not a fact that you said that the first consideration was the financial standing of the patient?

A. I don't remember.

XQ. 98. I will ask you now, then, doctor: is not that the first consideration—didn't you just say so?

Mr. Schmidt: I object to the last part. He did not say so.

Mr. Burdeau: No?

Mr. Schmidt: I object to it as to form.

Mr. Burdeau: This is cross-examination. I can lead him all I want to.

Mr. Schmidt: But I object to the form.

The Witness: What is the question again?

A. What do I base it on?

XQ. 99. No, sir. I asked you if that was not the most important factor. [302]

A. The financial ability of a patient to pay?

(Deposition of Carl G. Burdick.)

XQ. 100. Yes.

A. Naturally, if a patient has not got any money we operate on those patients for nothing.

XQ. 101. I know your profession——

A. There are a certain number of patients who are able to pay a very moderate fee. There are other patients who are able to pay what you might call a good fee. Now, that all depends on their capacity; their ability to pay.

XQ. 102. Those are the important and essential factors that you would take into consideration in any case that was submitted to you for an opinion as to the reasonable value of another surgeon's services?

A. For instance, I would not charge as much—in a wealthy patient, I would not charge as much for a circumcision as I would for this type of operation—going into the abdomen.

XQ. 103. That is not what I am asking you. I was just asking you an impersonal question, in a case like this, where the reasonable value of another surgeon's services are being inquired into. And you have mentioned three factors to be taken into consideration.

A. Yes. I would say a part of it is the financial capacity to pay. [303]

XQ. 104. In the hypothetical question submitted to you a number of the achievements and distinctions of Dr. Donovan are enumerated. He served six months as assistant resident surgeon at Mary Mc-

(Deposition of Carl G. Burdick.)

Clelland Hospital at Cambridge; he served two years' surgical internship at St. Luke's Hospital of New York City; He served four months as resident surgeon at Lying-In Hospital in New York City; and during the first year of practice received appointment as assistant attending surgeon at Babies Hospital in New York City and St. Luke's Hospital in New York City. Just for illustration: are those factors that you have taken into consideration in forming your opinion of Dr. Donovan?

A. Not all of that preliminary stuff, no. That is work that practically all of us have had.

XQ. 105. Any doctor who has become recognized as a surgeon has generally had similar experience?

A. You have to have that experience whether you get anywhere or not.

XQ. 106. Would the fact that Dr. Donovan was elected to membership in the American Surgical Association be a factor, with you, in forming your opinion of the reasonable value of his services?

A. I would say that—and I say this in all modesty—he was an outstanding surgeon to be elected to membership in the American Surgical Association. Now, I [304] would not say that because he is a member of the American Surgical Association he is preeminently qualified to do this particular operation.

XQ. 107. In other words, the fact of his membership would not add to the value of his services in a given case?

(Deposition of Carl G. Burdick.)

A. I would say that all of these various memberships bring out the fact that Donovan is an outstanding surgeon.

XQ. 108. But that particular fact would not have any weight with you one way or the other in a given case in forming an opinion as to the value of his services?

A. Well, of course you are coming to the meat of the cocoanut a little later on. Let us pass over that for the time being.

XQ. 109. Why?

A. I know, but you are coming to the things that do qualify him.

XQ. 110. I am not going to come to that at all.

A. I know, but——

XQ. 111. My purpose in asking you these questions is not to attack your testimony.

A. I understand that.

XQ. 112. But to show that this question itself is padded up with a lot of irrelevant matter.

A. I think that every lawyer that writes a hypothetical question pads it to the Queen's taste; I will say that. [305]

XQ. 113. Just one more question and we will quit this line. Would the fact that Dr. Donovan wrote a chapter which has been published in Christopher's Textbook of Surgery influence your opinion as to the value of his services?

A. I should think so, yes.

XQ. 114. Doctor, let us assume that a surgeon who has not had the distinction and honors that

(Deposition of Carl G. Burdick.)

Dr. Donovan has achieved, had performed this operation on the child in this case, with the same result, would the fact that he was without the reputation of Dr. Donovan but had done the same job make any difference in your opinion as to what his services were worth?

Mr. Schmidt: I object to the question in form, on the ground that it calls for a conclusion, first; and, secondly, it presupposes facts not in evidence in this case.

The Witness: Your question is, would a surgeon without all of these qualifications——

Mr. Burdeau: Will you please read the question to the witness?

(XQ. 114 repeated by the reporter.)

A. I would say of course the reason why these people—now, I don't know whether you are going to let me expatiate, or not; usually you don't. These people picked out Donovan because they felt that he was the [306] *the* best surgeon they could get.

XQ. 115. All right; I am going to interrupt you there to ask you how you know that.

A. I assume that anybody that tries to get somebody to come from New York, to fly down to Tucson, that they are doing that because they feel that there is not somebody nearer by that is just as competent: because it would be perfectly reasonable that if you could get somebody in a nearby town that was right on the job, that would be there within an hour, it seems to me it is perfectly reasonable to assume that

(Deposition of Carl G. Burdick.)

if you felt that man was just as competent that you would get him rather than to try to get a fellow like Donovan from New York.

XQ. 116. All right. Dr. Burdick, would you, in forming an opinion as to the reasonable value of the services of Dr. Donovan on the occasion of his visit to Tucson—which is involved in this case—take into consideration that he was absent from his office, and as the hypothetical question puts it, he had to leave his affairs to be carried on by his agents, and so on, or substitutes: would that be a factor in estimating the value of his services?

A. The fact that he left his office for—I don't know how long he was away, four or five days?

[307]

XQ. 117. Two days.

A. Well, of course I would not say that that was as much a factor as some other things.

XQ. 118. It is mentioned in the hypothetical question.

A. It is all right: if a man goes away from his office for a couple of days, that is worth something, there is not any doubt about that.

XQ. 119. Is not the only question there the value of his services in going to and from the place where he operates and the services rendered in operating?

A. Well, you might take into consideration the fact that he flew down there and flew back: there is a certain amount of risk in doing that sort of thing.

(Deposition of Carl G. Burdick.)

XQ. 120. I did not ask that question, doctor. My point is simply this. Is he entitled to charge both for the services he rendered in Tucson and to charge for work he was unable to do because he was in Tucson?

A. Well, I would say you would sort of lump those things together.

XQ. 121. You would? He is trying to be fully paid for his time and services from the time he left New York until the time he got back; you understand that? Now, the hypothetical question assumes that he is entitled to compensation for the time he was not in New York.

Mr. Schmidt: I must object to that in form, because it does not assume any such thing. [308] It assumes that while he was away from New York he might well not have earned some fees.

Mr. Burdeau: Well.

Mr. Schmidt: He does not ask to be paid because he was not here.

Mr. Burdeau: That is a pure speculation; which does not cure the defect in the hypothetical question.

XQ. 121. You would not say that he was entitled to work he did and work he could not do?

A. No, I don't think I would. I don't think I would.

XQ. 122. Doctor, I will have to ask you a little about your personal relations with Dr. Donovan. You know him very well, of course?

A. Yes, I know him pretty well. I would not

(Deposition of Carl G. Burdick.)

say that he was a close friend of mine; but he—well, I have known him for a long time. I have known him for fifteen or twenty years.

XQ.123. Have you ever had any professional associations with him?

A. No, never.

XQ.124. How did you come to be a witness in this case?

A. I haven't any idea. I told my secretary, "I don't know what they got me into this thing for."

XQ.125. Who asked you to come into it?

A. Donovan spoke to me about it. [309]

XQ.126. Did he speak to you on the telephone or by a visit?

A. He came up to see me.

XQ.127. And told you considerably about the case?

A. He told me about the case, and wanted to know if I thought that was a reasonable fee. I told him I certainly did.

XQ.128. What did he ask you was a reasonable fee? Just state the figure.

A. I have forgotten. I think he asked me this: I think he said, "What would you charge for a thing like that?" I think he said that.

XQ.129. And you, of course, not being a man of great experience in that particular branch of child surgery—did you tell him what you would charge for a similar operation?

A. I told him that I thought that they had gotten him down there——

(Deposition of Carl G. Burdick.)

XQ. 130. No. I am asking you what you told him you would charge for that kind of operation.

A. All right. I did not say what I would charge. I said, "If I were in your place I would charge"—I think I said to him what I have said here,—between \$10,000 and \$15,000.

XQ. 131. I am going to ask you now to explain, please, how you came to tell a man what his charge should be for a branch of surgery regarding which you say you yourself are not a specialist. [310]

A. Well, I would say that irrespective of the type of surgery that a man performs, if he was eminently qualified to perform that particular operation I would say that it was a reasonable fee.

XQ. 132. And in forming your opinion about that, doctor, you as I understand it have made a prominent factor the financial condition of the patient or the patient's parents?

A. Absolutely.

XQ. 132a. What did you know about the financial condition of the patient's parents?

A. All I know is that Donovan said in the first place when they called up they said that money was no object.

XQ. 133. Have you read this question?

A. I have. But I cannot repeat it.

(Note: There is no No. 134 in the deposition.)

XQ. 135. He did not tell you that Mr. Jeffcott said that, did he?

(Deposition of Carl G. Burdick.)

A. No, he told me—I think some doctor called him up.

XQ.136 So the hypothetical question attributes that statement to the doctors there; is that correct?

A. I don't know. I cannot remember the hypothetical question. I am trying to tell you my conversation with Donovan, if you will let me finish.

XQ.137. I am trying to get it.

A. All right; let me finish it. This doctor called [311] up and said—first, Dr. Donovan wanted them to come up to New York. Well, they would not do that; they wanted Donovan to come down there; so money was no object. I think Donovan was down at Atlantic City. He got a plane and went down there; he got down there, and I think he went in, and he said there were four nurses there; I think they were flying milk on from San Francisco or Los Angeles or something—anyway, the situation was that of a family of abundant means.

XQ.138. Now if you assume that the total assets of the family consist of a ranch—a stock raising ranch—of the approximate value of \$150,000, but which is mortgaged for \$50,000, and that the ranch itself is not paying and has not paid any income, and that the total income of the child's parents per year was \$5,000, would that make any difference to you?

A. I would wonder, first—I would say, "Who is paying for all these nurses? And who is paying for this milk that is being flown in?"—I don't know from where: California or some place.

(Deposition of Carl G. Burdick.)

XQ. 139. Then you think that the importation of milk and the four nurses, are factors that enter into it?

XQ. 140. And Dr. Donovan told you all that?

A. He told me that, yes.

XQ. 141. You have not yet answered my question as to whether [312] or not, assuming the facts that I have stated as to the net worth of the parents and their annual income of \$5,000, that that would make any difference in your own estimate of the value of Dr. Donovan's services.

Mr. Schmidt: I object to that as to form, on the ground that there is no basis laid for the facts stated in the question.

A. I would say that anybody with an income of \$5,000 a year did not have any right to expect a fellow to fly down from New York City to operate on their baby.

XQ. 142. In other words, that a man would not go from New York to Tucson say for \$500 expenses and \$1000 a day.

A. I know very well I would not.

XQ. 143. That is not the question. Do you think anybody else would be more charitable?

A. Now, listen——

XQ. 144. Now, you are bringing yourself into this, when you had no right to. I am asking you about the value of somebody else's services.

A. All right.

XQ. 145. Do you mean to tell me that no New

(Deposition of Carl G. Burdick.)

York surgeon of prominence would consent to go from New York to Arizona for \$500 expenses and \$1000 a day fee, under any circumstances?

A. Would you as a lawyer? [313]

XQ. 146. I would be tickled to death to do it. I wish to goodness I could get a few cases like that a year.

A. You would be smart enough to get it in advance. That is where Donovan made his mistake—in not pinning those fellows down.

XQ. 147. You have not yet answered my question. A. What is the question?

XQ. 148. The question is: Do you believe that there is no doctor—qualified surgeon—who would refuse to go from New York to Tucson for \$500 expenses and \$1000 a day?

A. I don't know whether there is or not.

Mr. Burdeau: That is all.

Mr. Schmidt: That is all.

CARL G. BURDICK.

Subscribed by Carl G. Burdick before me this day of December, 1941.

ALBERT GERBER,

Notary public.

Adjourned by consent of the attorney for the plaintiff and counsel for the defendants to Wednesday, December 10, 1941, at 2 o'clock p. m. to meet at the office of Dr. Fenwick Beekman, No. 121 East 60th Street, New York, N. Y. [314]

[Title of District Court and Cause.]

State of New York,
County of New York—ss.

Deposition of Fenwick Beekman taken pursuant to the annexed notice dated at Tucson, Arizona, the 12th day of November, 1941, as a witness on behalf of the plaintiff in the above-entitled action, before Albert Gerber, a duly appointed and qualified notary public of the state of New York for the county of New York, at the office of said Fenwick Beekman, No. 121 East 60th Street, Borough of Manhattan, City, County and State of New York, beginning at 2 o'clock p. m. on the 10th day of December, 1941, to which time and place the taking of said deposition was adjourned by consent of counsel for the respective parties herein. [315]

DEPOSITION OF FENWICK BEEKMAN

Fenwick Beekman, of lawful age, duly sworn as a witness on behalf of the plaintiff, testified as follows:

Direct Examination

By Mr. Schmidt:

Q. 1. Please state your name.

A. Fenwick Beekman.

Q. 2. Where do you reside?

A. 138 East 64th Street, New York City.

Q. 3. What is your profession?

(Deposition of Fenwick Beekman.)

A. Surgeon.

Q. 4. Where is your office for the practice of your profession?

A. 121 East 60th Street.

Q. 5. When and where have you been admitted to practice as a surgeon?

A. New York State, I think in 1909. I graduated in 1907.

Q. 6. What schools did you attend, other than college, in preparing for the practice of such profession?

A. The University of Pennsylvania Medical School.

Q. 7. How long were you in attendance at that school? A. Four years.

Q. 8. What degrees, if any, did you receive from that school?

A. M. D. Doctor of Medicine.

Q. 9. When was that degree conferred upon you? A. In June, 1907.

Q. 10. Did you have any other and special training which was designed to fit and prepare you for the practice [316] of such profession?

A. I did. I served a year in pathology in St. Luke's Hospital, and eighteen months in surgery at St. Luke's Hospital, New York City.

Q. 11. That is what is ordinarily termed an interne? A. Interne.

Q. 12. Are you a member of any professional organizations? A. I am.

(Deposition of Fenwick Beekman.)

Q. 13. What organizations are they?

A. I am first of all a diplomat of the American Board of Surgery; the American Board of Plastic Surgeons; I am a member of the American College of Surgeons; I am a member of the American Association of Oral and Plastic Surgery; I am a member of the American Association of Traumatic Surgeons; the New York Surgical Society; the American Medical Association; the New York Academy of Medicine.

Q. 14. Is admission to membership in any of those organizations you have named dependent upon the demonstration of special professional qualifications or accomplishments? A. Yes.

Q. 15. Which one or ones?

A. The American Board of Surgery; the American Board of Plastic Surgery; and the American College of Surgeons.

Q. 16. Is membership in the American College of Surgeons limited, doctor?

A. I do not know. No, it is not limited: the American [317] College of Surgeons is not limited.

Q. 17. Will you please state fully the nature and extent of your past experience in the practice of your profession.

A. I have been a surgeon at the Hudson Street Hospital, which is a part of New York Hospital; the Lincoln Hospital; the City Hospital. I am now visiting surgeon, Children's Surgical Service, Bellevue Hospital—in charge; I am now visiting sur-

(Deposition of Fenwick Beekman.)

geon of the Hospital for the Ruptured and Crippled; I am now consulting pediatric surgeon at Fitkin Memorial Hospital in New Jersey; I am now consulting surgeon to Lincoln Hospital; and I am attending surgeon, pediatric division, Midtown Hospital.

Q. 18. You have been practicing surgery ever since your admission? A. I have.

Q. 19. To what extent, in the course of your professional training and practice, have you become familiar with surgery incident to intestinal obstruction in the newborn due to volvulus?

A. I have seen many cases of this condition.

Mr. Burdeau: Just to clarify the answer, may I ask Dr. Beekman if by saying he has seen many cases, how many cases he personally has operated on?

The Witness: Yes. Perhaps ten. [318]

Mr. Burdeau: That is all I wanted to ask.

Q. 20. To what extent in the course of your professional training and practice have you become familiar with the general surgical conditions of infancy and childhood?

A. For the last twenty-two years I have been connected as visiting surgeon of the children's surgical service at Bellevue Hospital, which has seventy-five beds, with all surgical cases.

Q. 21. You testified before, did you not, doctor, that you were the chief surgeon of Bellevue?

A. Yes, of the children's surgical service.

(Deposition of Fenwick Beekman.)

Q. 22. Of the children's surgical service?

A. Yes.

Q. 23. Can you state, doctor—and, if you can, please state—how the surgical operation for the correction of intestinal obstruction in the newborn due to volvulus compares in difficulty of performance to other surgical operations for the correction of other serious conditions of infancy and childhood.

Mr. Burdeau: I object to that as indefinite, and as comparing a known condition with a variety of undescribed conditions.

Mr. Schmidt: Will you answer, doctor?

The Witness: Will you repeat your question?

(Q. 23 repeated by the reporter.)

A. You need a particular knowledge of the embryology [319] and development of the intestinal tract; you need a particular knowledge of the infant as an individual—physical make-up of the infant as an individual; and you need particular training and experience to learn and know the treatment of the condition.

Q. 24. Doctor, is it your opinion, based upon your long years of experience and practice, that without that knowledge it would be highly hazardous for a surgeon to perform such operation?

Mr. Burdeau: I object to that as speculative; not subject to expert opinion. A. It is.

Q. 25. How does such operation for correction of such obstruction compare in probability of suc-

(Deposition of Fenwick Beekman.)

cess and recovery of patient to operations for the correction of other serious conditions of infancy and childhood?

Mr. Burdeau: I object to that, on the ground that it is speculative; and, second, on the ground that it is a comparison of a given condition—obstruction due to volvulus—with a limitless range of other conditions.

A. I would say it was a very serious condition—if that answers it.

Q. 26. What would you say as to the probability of success in recovery of the patient compared with other serious operations?

Mr. Burdeau: I object to that as speculative [320] and as calling for a prognosis of a particular condition with a limitless range of other conditions.

The Witness: May I have the question?

(Q. 26 repeated by the reporter.)

A. That is a very difficult question to answer——

Mr. Burdeau: I should think so.

A. (Continued) ——because there are so many other different operations that might be of serious conditions. All I can say is that it is one of the most serious conditions.

Mr. Burdeau: Well, that is all right; but that is not what you were asked.

The Witness: What is that?

Mr. Burdeau: That is not what you were asked.

(Deposition of Fenwick Beekman.)

Q. 27. Well, doctor, would you say that an operation on a newborn infant for intestinal obstruction due to volvulus is one of the most serious operations that such infant could have?

Mr. Burdeau: I object to that as leading.

A. I think it is one of the most serious that you can operate upon.

Mr. Burdeau: You know that is as to form.

Mr. Schmidt: Yes.

Q. 28. Let me ask you, doctor, what operation on a newborn infant having to do with intestinal obstruction would you deem the most serious? [321]

The Witness: May I have that again?

(Q. 28 repeated by the reporter.)

Mr. Burdeau: I object to that, on the ground that it is irrelevant, immaterial, and not directed to the condition involved in this case.

A. I should say that some of the atresia obstructions of the intestines would be.

Q. 29. By atresia, does that cover volvulus?

A. Obstruction would cover volvulus. Atresia would be an obliteration of the intestinal lumen.

Q. 30. How does such operation for intestinal obstruction due to volvulus compare in difficulty of performance to some of the more serious operations which surgeons perform in cases of children of more advanced years or in cases of adults?

Mr. Burdeau: I object to that as irrelevant and immaterial; second, as speculative, and as calling for a comparison between a given condition and an

(Deposition of Fenwick Beekman.)

unlimited range of unspecified conditions.

The Witness: Can I have the question again?

(Q. 30 repeated by the reporter.)

A. All intestinal operations on newborn infants are very much more serious and difficult than in older individuals.

Q. 31. Doctor, how would an operation on a newborn infant for intestinal obstruction due to volvulus compare [322] with an intestinal operation on a child of more advanced years, or an adult?

Mr. Burdeau: I object to that, as immaterial and irrelevant.

A. If this can be off the record: I think my answer covered it.

Q. 32. Do you mind covering it again?

A. Any operation on an infant having to do with the intestines is far more serious than an operation on an older child.

Q. 33. How does such operation, that is on a newborn infant, compare in probability of success and in probability of recovery of the patient, to an intestinal operation performed on a child of more advanced years or upon an adult?

Mr. Burdeau: I object to that as immaterial and irrelevant and as speculative.

The Witness: May I have the question?

(Q. 33 repeated by the reporter.)

A. There is less chance of recovery, I should say.

Q. 34. Doctor, to what extent, if you know, must

(Deposition of Fenwick Beekman.)

a surgeon have specialized training, experience and skill in the performance of such operation for the correction of intestinal obstruction in the newborn due to volvulus in order that such surgeon may be expected to perform such operation with high degree of probability that the condition will be corrected and that the patient will recover? [323]

Mr. Burdeau: I object to that as speculative in all respects.

Mr. Schmidt: Mr. Burdeau, won't you reserve your objections: just make your objections as to form? The others are reserved to you. We are just filling the record up with all these objections, which are going to be taken at the trial anyhow. I mean it is understood that you reserve all rights to object to the relevancy and so forth. If you don't mind.

Mr. Burdeau: I still want to object to some of them on the record.

Mr. Schmidt: All right.

The Witness: May I have it repeated?

(Q. 34 repeated by the reporter.)

A. He must have knowledge of the condition; he must have knowledge of the embryological development; he must have experience in having done other cases and seen the variations that might occur in them. Is that the answer; does that answer the question?

Q. 35. I think so. What surgeon or surgeons of the State of New York, if you know, had had suf-

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ficient special and outstanding training and experience on or about April 1, 1939, to prepare and fit him or them to perform such operation for correction of intestinal obstruction in the newborn due to volvulus with high degree of probability that such operation would cor- [324]rect such condition and that the newborn patient would recover?

Mr. Burdeau: I note the usual objection.

A. I think the man who has done the most work in New York State has been Dr. Donovan.

Q. 36. That is Dr. Edward J. Donovan?

A. Dr. Edward J. Donovan.

Q. 37. The plaintiff in this case?

A. The plaintiff in this case. There are others, like Dr. Peterson, who is connected with the Post-Graduate Hospital. And there is a young man in my service at Bellevue, named Dr. John E. Sullivan.

Q. 38. But, from your own knowledge, in this state, where would you place Dr. Donovan relative to skill in the performance of such an operation among those whom you have named?

A. I think I would place him at the head.

Q. 39. Doctor, do you know what surgeons in the United States were generally regarded by the members of the medical profession of the United States, on or about April 1, 1939, as being eminently qualified to give specialized attention to surgical conditions of infancy and childhood?

Mr. Burdeau: I object to that, on the ground

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that it is irrelevant and immaterial; and the only question here is the reasonable value of the services rendered by Dr. Donovan.

A. Dr. William Ladd of Boston has been a leader in intes- [325] tinal surgery in infancy, and Dr. Downes, until he was sick, was one of the foremost; Dr. Boling, who died some years ago, was one of the leaders in this thing; and Dr. Donovan has followed them.

Q. 40. Those doctors you have named, from your own knowledge, are those whom the medical profession deem best qualified to perform this type of operation that we have described in this examination? A. They are.

Mr. Burdeau: I object to that as hearsay.

Q. 41. Doctor, have you had opportunity in the course of your years of practice as a surgeon to know from time to time the basis upon which the more prominent and higher ranking surgeons in New York City determine the fees which they charge for surgical operations? A. I have.

Q. 42. Have you had opportunity in the course of your practice to know the amount of fee which has been charged from time to time by some of the more prominent and able surgeons of New York City for specialized operations which they have performed? A. I have.

Mr. Burdeau: I object to that as immaterial and irrelevant, and as not directed to services of the kind rendered by Dr. Donovan.

(Deposition of Fenwick Beekman.)

Q. 43. Have you had the opportunity as a result of and in [326] the course of your years of practice as a surgeon to learn and know the amount of fees charged by prominent and able surgeons who give specialized attention to surgical conditions of infancy for performing the operation for correction of intestinal obstruction in the newborn due to malrotation of the intestines, with volvulus?

A. I would not be qualified to answer that question, because it is too rare a condition, and prices have not been exposed to my knowledge.

Q. 44. So that the condition of an infant suffering with an intestinal obstruction due to malrotation of the *intestinal obstruction due to malrotation of the* intestines with volvulus, is a rare condition? A. Oh, it is a rare condition.

Q. 45. Have you had opportunity, in the course and by virtue of your years of practice as a surgeon, to learn and know what has been the practice from time to time of prominent and able surgeons of New York City for fixing the amount of fee to be charged for specialized operations in cases where they have been called upon to leave their offices and practices in New York and to go to distant points within the United States to perform such operations? A. Yes, I have.

Q. 46. What has been such practice?

A. I think the fees are judged on the time, the surgical [327] condition, the experience and knowledge required and also, as you know, the ability of

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the individual to pay the fees, as life is of relative value to us; in other words, the life of a poor man is just as valuable to him as that of a rich man, but, as he has a relatively smaller income, the fees demanded of him would be less than those demanded of a man with a relatively higher income.

Q. 47. Getting back to my question of the practice of charging fees by New York surgeons who are asked to leave the city and go to distant places of the United States; do they charge higher, or smaller, fees, for doing that? A. Higher fees.

Q. 48. And that is the practice?

A. That is the practice..

Q. 49. What has been the general attitude, if you know, of the members of the medical profession towards such practice on the part of such surgeons, with reference to approving or disapproving such practice?

A. I will have to have that repeated.

Q. 50. Let me put it in shorter form. Does the medical profession approve or disapprove such practice? A. They approve of it.

Q. 51. Doctor, have you had the opportunity in the course of and by virtue of your professional practice to learn and know what has been the custom from time to [328] of prominent and able New York surgeons in going to distant points and there performing specialized operations, on the matter of returning patients to the care of local physicians and surgeons as soon after the operation

(Deposition of Fenwick Beekman.)

as the condition of the patient indicates the termination of the need for specialized care?

A. Yes, I think so.

Q. 52. What was the custom, on or about April 1, 1939?

A. The practice is not to leave until the patient apparently is on the way to recovery.

Q. 53. And, when the need for specialized care is over, is it the practice to turn them over to the care of their own surgeon and local doctor?

A. It is.

Q. 54. Is that the custom and practice approved by the medical profession? A. It is.

Q. 55. Have you become familiar with and are you able based upon your past training and experience as a physician and surgeon, and based upon your professional knowledge of what constitutes the reasonable value of the professional service of a physician and surgeon, to form and express an opinion as to the reasonable value of the professional services of any prominent and eminently qualified surgeon of the City of New York in performing a specialized surgical operation when you [329] know the following facts, namely, the background of such physician and surgeon in schooling, training and experience; the particular qualifications of such surgeon to perform such specialized operation; the nature of the negotiations by which such surgeon was employed to perform such specialized operation; the means by which such

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surgeon traveled to and from the point of performing such operation and the length of time during which such surgeon was required to be absent from his New York City office and away from his New York practice in going to the place of the operation, in performing the operation, in remaining with the patient following the operation and in returning to New York City; the time and place at which such operation was performed; the age of the patient at the time of the operation; the personal history of such patient; the results of physical examinations of the patient by physicians and surgeons; the clinical findings, and other pertinent information concerning the patient which might indicate the nature of such specialized operation; the manner in which such operation was performed by such physician and surgeon; the facts and circumstances which indicate whether the operation was or was not successful, and the facts and circumstances tending to indicate whether or not the patient should be reasonably expected to recover:

Knowing all that, doctor, are you from your past [330] experience in a position to form and express an opinion as to the reasonable value of the professional services of such a surgeon?

A. Yes.

Q. 56. If it be assumed that Dr. Edward J. Donovan, who maintains offices at 862 Park Avenue in the city and state of New York, after completion of the usual pre-college schooling, attended the College

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of Physicians and Surgeons of Columbia University from 1917 to 1920, graduated with the degree of M. D., and was elected to Alpha Omega Alpha Society, which is the medical honor society; and if it be further assumed that said Dr. Donovan, following such schooling, was duly licensed by the State of New York and admitted to practice as a physician and surgeon on or about the 1st day of June, 1921; and if it be further assumed that Dr. Donovan served six months as Assistant Resident Surgeon at Mary McClelland Hospital at Cambridge, New York, and served two years surgical internship at St. Luke's Hospital of New York City from January 1, 1921, to January 1, 1923, and served four months as Resident Surgeon at Lying-In Hospital in New York City, and that during the first year of practice received appointments as Assistant Attending Surgeon at Babies Hospital of New York City, and during such service continuing to 1926 he did a great part of the emergency surgery in both institutions, and that in 1926 he was promoted [331] to Associate Attending Surgeon in both the Babies Hospital and St. Luke's Hospital in New York City and in 1926 was appointed as Assistant Professor of Surgery of the College of Physicians and Surgeons of Columbia University in New York City, and is still so acting and in or about the same time he was made a Fellow of the American College of Surgeons, and in 1929 was elected to membership in the New York Surgical Society, and in 1930 he

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was made Surgeon in Chief of the Babies Hospital, one of the units of the Medical Center of Columbia University, at which hospital all children up to the age of twelve years from the Medical Center are cared for, and that he was at about the same time made a full Attending Surgeon, which is the highest rank given at St. Luke's Hospital, at St. Luke's Hospital, and together with an associate surgeon was placed in charge and still is in charge of one of the surgical services in said hospital, and that about 1930 he was made and is still acting as Consulting Surgeon at the Yonkers General Hospital at Yonkers, New York at Northern Westchester Hospital at Mt. Kisco, New York, and at Fitkin Memorial Hospital at Asbury Park, New Jersey, and that in 1936 he was elected to membership in the American Surgical Association, which is a national honorary society whose membership in the United States is limited to one hundred seventy-five surgeons; and [332] assuming further that during the first seven years of practice he engaged in a general practice and surgery at the Babies Hospital and St. Luke's Hospital of New York City, and that during the past twelve years his practice has been devoted exclusively to surgery, and that during the past ten years he has written many articles on abdominal surgery, and has written a chapter on infant surgery published in "Christopher's Textbook of Surgery," which book is used in a great many medical schools throughout the country, and

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that he has written a chapter in Nelson's Looseleaf Surgery, on Pyloric Stenosis in infancy, which text book is the most modern standard reference text-book in use in the United States, and that he collaborated in panel discussions on intestinal obstructions in infancy at the meeting of the American College of Surgeons in 1939, and at the meeting of the Academy of Pediatrics in Boston in 1941; and if it be further assumed that on or about the 1st day of May, 1923, Dr. Donovan established private offices in the city of New York and began there to carry on the practice of his profession as a physician and surgeon, giving specialized attention to surgical conditions of infancy and childhood; and if it be further assumed that Dr. Donovan thereafter continued and now continues to carry on such specialized professional practice; and if it be further assumed that by [333] April 1, 1939, Dr. Donovan had attained a position of very high standing in the ranks of his profession and was then generally regarded by physicians and surgeons as being one of the very few physicians and surgeons of the United States who had acquired national prominence due to outstanding and eminent qualifications and success in such specialized field of practice of the medical profession; and if it be further assumed that, on or about said 1st day of April, 1939, Dr. Donovan had had a very high and outstanding degree of experience in performance of operations for correction of intestinal obstruction in infants due

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to malrotation of the intestine, volvulus and other related abnormalities; and if it be further assumed that, on or about April 1, 1939, Dr. Donovan was generally regarded by physicians and surgeons of the United States as then being very highly qualified, by his training and experience, to perform surgical operations for the correction of intestinal obstruction in the newborn due to malrotation of the intestine, with volvulus; and if it be further assumed that Robert J. Jeffcott, infant son of David C. Jeffcott and Elsie Jeffcott, his wife, the defendants in this action in which your testimony is being taken, was delivered at Desert Sanatorium, located at Tucson, Arizona, on March 24, 1939; and if it be further assumed that beginning shortly after birth it was ap- [334] parent to the physicians and surgeons of Tucson, Arizona, who were then attending such infant, that the said Robert J. Jeffcott was suffering from some abnormal condition; and if it be further assumed that, beginning on the fifth day of life of such infant, it became and was apparent to such attending physicians that a partial obstruction of the intestinal tract of such child was present; and if it be further assumed that following the taking of gastrointestinal x-rays of such infant on March 31, 1939, it was the impression of such attending physicians that it was necessary that a surgical operation be performed for the correction of such abnormal condition of such infant; and if it be further assumed that the said defendants in such

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action, namely, the said David C. Jeffcott and Elsie Jeffcott, his wife, parents of such infant, were then advised by such attending physicians of the presence of such abnormal condition of such newborn child, of the apparent necessity for such surgical operation and of the seriousness thereof; and if it be further assumed that such parents were thereupon also advised by such attending physician as to the respective and comparative qualifications, for the performing of such operation, of Dr. Edward J. Donovan and of one or two other physicians and surgeons of the United States, all having national prominence in regard to and as [335] the result of carrying on their professional practice with specialized attention to surgical conditions of infancy and childhood; and if it be further assumed that the said parents of such infant then and thereupon decided that they desired to employ the said Dr. Donovan to perform such operation and such parents stating that they had made such decision because of Dr. Donovan's high qualifications and his unusual degree of experience for the correction of intestinal obstruction of the newborn child, then apparently needed by their infant son, and if it be further assumed that such parents, then and thereupon, authorized and instructed one or more of such attending physicians to act on their behalf, as their agent or agents, in negotiating with and employing the said Dr. Edward J. Donovan to perform such operation on their infant son; and if it

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be further assumed that such agent or agents of such parents then and thereupon pursuant to such authority and instructions communicated to the said Dr. Donovan the information concerning the apparent condition of such infant, the information concerning the desire of such parents to employ said Dr. Donovan to perform such operation and such information as Dr. Donovan desired and requested, concerning the parents of such infant, to aid him in deciding whether or not to accept such employment; and if it be further assumed that such agent or agents of such [336] parents in the course of such negotiations for the employment of said Dr. Donovan advised him that it was the desire of such parents that such operation be performed as soon as possible; and if it be further assumed that in the course of such negotiations between such physician and the said agent or agents, the said Dr. Donovan indicated that such infant could be brought to New York City by airplane and that he would perform the desired operation as soon as possible after arrival of such infant at such city; and if it be further assumed that such parents of such infant were then advised by such agent or agents of such tentative negotiations of such desired employment; and if it be further assumed that such agent or agents then and thereupon and in the further course of such negotiations and pursuant to the further authority and instructions of such parents and for and on behalf of such parents did ad-

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advise the said Dr. Donovan that the said parents did not desire that such infant be taken to New York for such operation, that they were desirous that Dr. Donovan perform such operation, in preference to any other physician and surgeon, that money was no object to them in the matter of such proposed employment and that they desired and requested that Dr. Donovan fly to Tucson, Arizona, as soon as possible by airplane, and there perform such operation, regardless of the cost to [337] them; and if it be further assumed that the said Dr. Donovan then and thereupon and as the result of such negotiations for his employment and relying upon such representations made by such agent or agents on behalf of such parents, did undertake such proposed employment as desired and requested by such parents, and did agree that he would fly to Tucson, Arizona, departing from the New York area on April 1, 1939, and that, upon his arrival, he would examine such infant and consult with such attending physicians and that he would thereafter perform such operation, at Tucson, Arizona, as should seem to be needed by such infant; and if it be further assumed that such negotiations were thereupon closed, without any express agreement being discussed or reached as to the amount of fee to be charged by Dr. Donovan, and to be paid by such parents, for such operation; and if it be further assumed that on April 1, 1939, and in the course of such employment undertaking, the said Dr. Donovan did

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leave his New York City office and his practice to be cared for by his agents and employees during his absence, did depart from New York City and did fly to Tucson, Arizona; and if it be further assumed that such Dr. Donovan on April 2, 1939 and in the continued course of such employment undertaking, did enter into and conduct consultations with some or all of the said attending physicians of such infant, at Tucson, Arizona, did examine such infant and the x-rays previously mentioned, did gain therefrom the impression that such infant was then suffering from an abnormal condition consisting of malrotation of the intestine, with volvulus, and did operate upon such infant at said Desert Sanatorium Tucson, Arizona, for correction of such condition; and if it be further assumed that the said Dr. Donovan, in the course of performing such operation at such time and place and in the course of his said employment undertaking, did find the pathology to be as follows, namely: that there was no fusion between the gastrocolic omentum and the transverse mesocolon of such infant; that the cecum and the ascending colon of such infant lay in the upper right quadrant of the abdomen; that the small intestine of such infant, beginning at a point about twenty centimeters from where the duodenal-jejunal junction should be, was turned to the right, around the root of the mesentery, about two and one-half complete turns; that the lower half of this intestine was blue and

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completely collapsed; that the terminal ileum of such infant was bound down to its mesentery by a definite, firm band which almost completely kinked it; that the duodenum of such infant instead of taking its normal course passed downwards and emerged from its retroperitoneal position by passing through an opening in [339] the mesentery of the terminal ileum about ten centimeters from the ileocecal junction; and if it be further assumed that the said Dr. Donovan, in the further course of performing such operation at such time and place and in the further course of his said employment undertaking, did enter such infant by and through a right rectus incision, did bring the cecum of such infant down to its normal position, did cut away the band on the ileum of such infant, did then untwist the volvulus by turning all of the small intestine of such infant about two and one-half turns in a counter-clockwise direction, did then attach the cecum of such infant to the parietal peritoneum in the right lower quadrant of the abdomen of such infant by the use of two interrupted sutures of chromic and did then complete such operation by closing the abdomen of such infant in layers; and if it be further assumed that the condition of such infant was good at the completion of such operation; and if it be further assumed that such infant was thereupon and immediately transfused and then given a continuing infusion of glucose and saline until such infusion was no longer needed; and if it

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be further assumed that the said Dr. Donovan, after completing such operation in such manner and in the further course of his said employment undertaking, did remain at Tucson, Arizona, in further attendance of such infant, [340] for a period of approximately twenty-four hours after completion of such operation and until it had become apparent to him that the condition of such infant no longer required his specialized care; and if it be further assumed that Dr. Donovan thereupon and in the continued course of his said employment undertaking departed from Tucson, Arizona, and returned to his New York office, traveling by airplane; and if it be further assumed that such operation, performed by the said Dr. Donovan in the aforesaid manner and in the course of his said employment undertaking, was a success, in that such infant survived such operation with apparent normal functioning of the intestinal tract; and if it be further assumed that an x-ray of the intestinal tract of such infant, made on October 1, 1939, indicated that the cecum and colon of such infant were then in normal position; and if it be further assumed also that the said Dr. Donovan, for a substantial period of time after his return to New York City, received continuing reports from one of the attending physicians of such infant at Tucson, Arizona, as to such infant's condition, and devoted his time and attention and professional ability to consideration of such reports and to extend-

(Deposition of Fenwick Beekman.)

ing his professional advice, as such specialist, to such attending physician:

Then and under all such circumstances what, in [341] your opinion, would be the reasonable value of such professional services provided by the said Dr. Edward J. Donovan to such parents of such infant in the course of such employment?

Mr. Burdeau: The hypothetical question addressed to the witness is objected to on the following grounds:

(1) The said hypothetical question includes and contains immaterial and irrelevant assumptions;

(2) The hypothetical question includes and contains assumptions based upon the unsworn statements of third persons not parties to this action;

(3) The hypothetical question requires the witness to draw inferences from the statements of other persons not parties to the action; and

(4) The hypothetical question requires the witness to determine what facts are established by the unsworn statements of other persons not parties to the action, and to take such facts as he so finds into consideration in forming his opinion.

A. I should say about \$10,000 to \$15,000.

Cross Examination

By Mr. Burdeau:

XQ. 57. I understand your last answer to be that your [342] opinion of the reasonable value of Dr. Donovan's services was from \$10,000 to \$15,000. A. Yes.

(Deposition of Fenwick Beekman.)

XQ. 58. Is there any more definite figure that you can give as an answer to that question?

A. No, I do not think there is.

XQ. 59. Under what circumstances would the services be worth \$10,000?

A. I put \$10,000 to \$15,000 because I do not know the financial condition of the individuals involved.

XQ. 60. Then if I should ask you under what conditions the services would be worth \$15,000, your answer would be the same; is that it?

A. It would be.

XQ. 61. So that the spread of 50 per cent of \$10,000 would be dependent entirely upon the financial conditions of the patient or its responsible parents? A. Yes.

XQ. 62. Those employing the surgeon?

A. Yes.

XQ. 63. I infer from a remark you made that you have talked about this case with Dr. Burdick. Is that correct?

A. No, I have not. I have known Dr. Burdick, though: I worked with him for many years.

XQ. 64. Am I mistaken in my understanding that you said that you understood that Dr. Burdick was very much disturbed about that hypothetical question? [343]

A. You made a remark earlier in the thing about having a hard time; and I just was joking with you in making a remark about Dr. Burdick.

(Deposition of Fenwick Beekman.)

XQ. 65. I know; but what caused you to make such a remark: that you understood that Dr. Burdick—

A. Because I know he always gets fussed up when he is questioned by lawyers.

XQ. 66. He has not mentioned this question?

A. No, not to me.

XQ. 67. Have you talked this case over with Dr. Donovan?

A. I had a telephone talk with Dr. Donovan, when he asked me if I would be willing to testify for him.

XQ. 68. You have not talked it over across the table?

A. No, I have not seen Dr. Donovan since he called me up—, yes, he came in to my office: he called me upon the 'phone, and made a date, and came to the office and told me about the case.

XQ. 69. Have you ever heard of a case of this kind being performed by a surgeon of comparable skill and experience for less than \$10,000?

A. What do you mean: a case of exactly this kind?

XQ. 70. I am speaking, always, of a case such as involved here, as I understand it intestinal obstruction due to volvulus—whatever that means?

A. What is the question?

XQ. 71. I ask you if you have heard of a case of this particular kind, that is, intestinal obstruction due to [344] volvulus; where the surgeon operated for a fee of less than \$10,000?

A. Yes.

(Deposition of Fenwick Beekman.)

XQ. 72. How much less, doctor?

A. It has been done—I have done it myself for nothing; and I have done it for \$300.

XQ. 73. Then, to be fair about this thing, I want you to explain that that was due because of the financial condition of the patient; is that it?

A. Absolutely.

XQ. 74. And it ranges all the way from \$300?

A. Absolutely.

XQ. 75. In the course of your testimony, you were asked what qualifications a surgeon had to have for this kind of an operation. A. Yes.

XQ. 76. If my notes are correct, you said he must have particular knowledge of the embryology of the intestinal tract. Now, any surgeon who undertakes to perform an operation of this kind must have that knowledge, whether he is prominent, or not, as a matter of fact?

A. Yes, that is the fact

XQ. 77. What did you mean when you said that he must also have particular knowledge of the infant as an individual?

A. I mean that individual people who do not do much [345] surgery of infancy have not the knowledge or the skill in handling the delicate tissues or in handling the after care of the individual.

XQ. 78. I understood you to say that a surgeon must have more than the ordinary experience in this particular kind of operation, to justify the belief or the expectation that this operation would be successful; is that correct? A. It is.

(Deposition of Fenwick Beekman.)

XQ. 79. Every doctor who performs this operation must do it for the first time; is not that correct? A. That is true.

XQ. 80. Then there is not much expectation of that resulting favorably, is there?

A. There is less expectation of it resulting favorably than with one who has had experience.

XQ. 81. And you said these were rare conditions. A. Yes.

XQ. 82. You have seen a great many of them?

A. I have not seen a great many of them myself.

XQ. 83. I thought you did testify that on your direct. A. I said I have seen some.

XQ. 84. You have operated some?

A. Oh, yes.

XQ. 85. About how many?

A. I should say ten or fifteen.

XQ. 86. This condition occurs wherever babies are born, doesn't it? [346] A. Yes.

XQ. 97. They are not all treated by New York surgeons, are they? A. No.

XQ. 88. I will ask you whether or not in your opinion there are surgeons in most good size American cities competent and skillful enough to perform this operation.

A. I want to differ with you there.

XQ. 89. All right.

A. Because—if I can qualify it?

XQ. 90. Go ahead.

(Deposition of Fenwick Beekman.)

A. Because I think there are very few men in this country who have been trained particularly in the surgery of infancy and the recognition and treatment of this condition is a rather recent development.

XQ. 91. So that a child who has this unfortunate condition and is not able to get a man from New York is taking chances, in your opinion; is that correct?

A. I do not say "from New York" to any extent. There are surgeons in other cities, such as Dr. Ladd in Boston.

XQ. 92. But, outside of the few you have mentioned, the child is taking chances; is that correct?

A. I don't know about the western surgeons as well as I do about these others. But I think that anyone is taking a chance who is operated with a man who has not had particular training in pediatric surgery. [347]

XQ. 93. All right. You have mentioned New York and Boston and I believe Philadelphia—did you? A. No, I did not.

XQ. 94. I will ask you whether or not you think that in the city of Philadelphia there is any surgeon competent to perform this operation.

A. I think there probably is.

XQ. 95. How about New Orleans?

A. I do not know anything about New Orleans.

XQ. 96. Would you say that your belief is that there is not?

A. I do not know of any man who specializes there in pediatric surgery.

(Deposition of Fenwick Beekman.)

XQ. 97. Let me ask you, doctor, for my own information: what is pediatric surgery?

A. The surgery of infancy. Pediatricians look after children.

XQ. 98. If a case of this kind occurs in a city like New Orleans, Los Angeles, San Francisco, or St. Louis, wouldn't you think there was a man there competent and skillful enough to take care of it?

Mr. Schmidt: I object to that, as to form.

A. I would not say that there were men there who were as competent to look after the case as one trained particularly in the surgery of infancy.

XQ. 99. But you know that those cases do occur in those cities,—all cities of the United States—do you not?

A. They do. Not very many; but they do. [348]

XQ. 100. Somebody takes care of them?

A. Not always. Many of them die without ever being taken care of.

XQ. 101. I suppose that some of them die even when they are taken care of carefully by these eminent men? A. They do.

XQ. 102. All right. Now, doctor, getting back to the amount to be charged: assume a competent, skillful, experienced surgeon of New York of the rank of Dr. Donovan being called to Tucson; he spends two days going, coming and performing the operation. A. What operation?

XQ. 103. The operation involved in this case; and is paid \$500 travel expense and \$2,000, that is,

(Deposition of Fenwick Beekman.)

at the rate of \$1,000 a day: do you say that that is insufficient?

A. I would say that that was insufficient.

XQ. 104. Now would you give me the reasons for that, doctor?

A. First of all, you said he is being paid at the rate of \$1,000 a day. The time consumed is only one factor.

XQ. 105. I do not want to quibble on the time factor. Let us assume that his fee was \$2,000 and he took only two days, and he was paid \$500 as travel expense; that in your opinion would not be sufficient? A. It would not.

XQ. 106. Then let us have your reason? [349]

A. Because Dr. Donovan is an outstanding man in the treatment of this condition.

XQ. 107. And you do not think \$1,000 a day is sufficient compensation for a man of Dr. Donovan's standing?

A. Dr. Donovan might easily lose a case here in New York City that would pay him \$5,000 or \$10,000 in that time.

XQ. 108. In other words, you reckon the value of his services not alone by what he actually did, but also by what he might not have done if he had not been called in that case?

A. I do; and his skill.

XQ. 109. You do not suppose that Dr. Donovan, who performs a great many of these operations, gets \$10,000 to \$15,000 for each one he performs, do you?

(Deposition of Fenwick Beekman.)

A. Not for each one he performs, no.

XQ. 110. He gets a great deal less in some cases, doesn't he?

A. He gets a great deal less in some cases.

XQ. 111. Then if he performed an operation of this character out of town—two days out of town—you would say that because he was away from his office for two days, regardless of any other factor he would be justified in charging from \$10,000 to \$15,000 because he might have lost a case in his office?

Mr. Schmidt: I object to that as to form, on the ground that it is based upon conclusions that are not present here, and no proper foundations were [350] laid for the facts set forth in the question.

The Witness: Please read the question over.

(XQ. 111 repeated by the reporter.)

A. No.

XQ. 112. Well, you do not take into consideration as a factor in forming your opinion as to the value of Dr. Donovan's services that he should be paid for what he did not do while he was away as well as for what he actually did?

The Witness: Let me have that again repeated.

(XQ. 112 repeated by the reporter.)

A. No; not what he did not do; but that he was not on call in his office or in the hospital during that period.

XQ. 113. If he performed an operation of the same degree of seriousness in New York, do you

(Deposition of Fenwick Beekman.)

think he would be entitled to be paid, in addition to the reasonable value of his services, something for the time that he was not in his office on call?

A. He is on call while he is in the operating room performing the operation in New York City.

XQ. 114. But that is not an answer to my question, doctor. An operation takes some time, does it not? A. Yes.

XQ. 115. And while the surgeon is operating you do not think he is entitled to charge something for what he might have gotten in the way of business while he was per- [351] forming that operation?

A. That is all taken into consideration in the fees.

XQ. 116. All right. That helps me a little.

Now let us get back to this other question. I would like to have you state again what factors you take into consideration in forming your opinion of the reasonable value of another surgeon's services.

A. You would like to have me——

XQ. 117. State again what factors you take into consideration in forming your opinion of the value of another surgeon's services.

A. I take into consideration his time; I take into consideration his education; I take into consideration his knowledge; I take into consideration his experience; I take into consideration the individual finances or income of the individual he treats.

XQ. 118. And the factor of the doctor's knowl-

(Deposition of Fenwick Beekman.)

edge and experience, how do you arrive at your own knowledge of that fact?

A. By the results that he has presented to the profession through his scientific papers and the wisdom in which he is held for the work he has done.

XQ. 119. Does membership in a surgical society, in your opinion, constitute a factor?

A. It is a factor.

XQ. 120. Does the fact that he has written a chapter in Christopher's Textbook of Surgery amount to a factor [352] in your estimation in considering the value of his services?

A. It shows his experience.

XQ. 121. How about Nelson's Looseleaf Surgical Service: Do you take that into consideration as a factor?

A. As a part of his experience.

XQ. 122. In the hypothetical question put to you, you were asked to assume as follows:

“* * * that the said Dr. Donovan, in the course of performing such operation at such time and place and in the course of his said employment undertaking, did find the pathology to be as follows, namely: that there was no fusion between the gastrocolic omentum and the transverse mesocolon of such infant; that the cecum and the ascending colon of such infant lay in the upper right quadrant of the abdomen; that the small intestine of such infant, beginning at a point about twenty centimeters

(Deposition of Fenwick Beekman.)

from where the duodenal-jejunal junction should be, was turned to the right, around the root of the mesentery, about two and one-half complete turns, that the lower half of this intestine was blue and completely collapsed; that the terminal ileum of such infant was bound down to its mesentery by a definite, firm band which almost completely kinked it; and that the duodenum of such infant instead of taking its normal course passed downwards and emerged from its retroperitoneal position [353] by passing through an opening in the mesentery of the terminal ileum about ten centimeters from the ileocecal junction; and if it be further assumed that the said Dr. Donovan, in the further course of performing such operation at such time and place and in the further course of his said employment undertaking, did enter such infant by and through a right rectus incision * * *:

Now, that would not be understood by the average man, would it? A. No.

XQ. 123. It would not be understood by a jury, would it?

A. No, I do not think so.

Mr. Schmidt: I object to that, as to form. It is calling for a conclusion. There may be a doctor on the jury.

XQ. 124. That is all technical medical language, is it not? A. I should say so, yes.

XQ. 125. And, reduced to plain English, it means that the infant child involved in this case

(Deposition of Fenwick Beekman.)

had an intestinal obstruction due to a kink or a twisting; is that right? A. No.

XQ. 126. Well?

A. The infant child in this case had an intestinal obstruction due to a kinking *of* a twisting of any abnormally developed intestine. [354]

XQ. 127. An abnormally developed intestine?

A. Yes.

XQ. 128. Do you know anything about the other abnormality of his intestine?

A. What other abnormality?

XQ. 129. In other words, I tried to translate this into plain language and you corrected me by saying that I did not correctly do so, because the child had other abnormal conditions. A. Yes.

Mr. Schmidt: I object to that question. It is not based on any foundation at all; and it states facts that were not brought out by that answer.

Mr. Berdeau: Dr. Beekman understood me. I said I read a quotation or an extract from the hypothetical question; and I asked him if that in plain English did not mean that this child suffered from an intestinal obstruction due to a kink or twisting.

Mr. Schmidt: And he said No.

Mr. Burdeau: I understood his answer to be that that was not the whole meaning of it: that the child suffered from some abnormal condition of the intestine: Is that correct?

The Witness: That is correct.

XQ. 130. And, whatever abnormal conditions

(Deposition of Fenwick Beekman.)

you have in mind, are embodied in these technical terms? [355] A. Absolutely.

XQ. 131. Is that right? A. Absolutely.

Mr. Burdeau: That is all.

Redirect Examination

By Mr. Schmidt:

RDQ. 132. You stated before that you have performed those operations for nothing?

A. Yes.

RDQ. 133. You stated before you have performed those operations for \$300? A. Yes.

RDQ. 134. In either of those cases were you asked to take an airplane to Tucson, Arizona?

A. I was not.

RDQ. 135. In either of those cases were you asked to leave the city? A. I was not.

RDQ. 136. In either of those cases were you told that money was no object? A. I was not.

FENWICK BEEKMAN, M. D.

Subscribed by Fenwick Beekman before me this 17th day of December, 1941.

[Notarial Seal] ALBERT GERBER

Notary Public, New York County No. 307. Cert.
filed in Kings County No. 38. Commission expires March 30, 1943. [356]

Mr. Allen: Plaintiff will rest, then, your Honor.

Mr. Robertson: Now, your Honor, I am going to produce the testimony of Mr. Jeffcott and some tes-

timony of Mrs. Jeffcott, and I will have the testimony of at least three local surgeons and physicians who will testify in connection with the matter of the reasonableness of the charge, and I am perfectly willing to go ahead with Mr. Jeffcott, if you think anything might be facilitated by it. It is close to noon, and if it is your intention to stop at twelve, I don't think we can do much.

The Court: Could you complete your examination of Mr. Jeffcott by twelve-thirty or a quarter to one?

Mr. Robertson: I probably could, yes.

The Court: Then let Mr. Jeffcott take the stand. [357]

DAVID C. JEFFCOTT

one of the defendants herein, was called as a witness in behalf of defendants, and having been first duly sworn according to law to testify to the truth, the whole truth and nothing but the truth, was examined and cross-examined and testified as follows:

Direct Examination

By Mr. Robertson:

Q. Mr. Jeffcott, you are one of the defendants in this action? A. Yes, sir.

Q. When did you first come to Arizona, Mr. Jeffcott? A. In the early part of 1936.

Q. For what purpose?

A. To recover from tuberculosis of the lungs.

(Testimony of David C. Jeffcott.)

Q. And upon your coming to Arizona, were you required to live quietly or did you live an active life?

Mr. Allen: I object to that.

The Court: It is a preliminary question.

A. I was forced to lead a very inactive life.

Mr. Robertson:

Q. On or about that time, Mr. Jeffcott, did you receive [358] any gift from your father?

A. Yes, sir, in 1935.

Q. What date?

A. I believe it was in the early part of December.

Q. And could you estimate roughly the size of that gift or the amount of it?

A. I think it was between seventy-five and one hundred thousand dollars.

Q. And what was the nature of the gift, stocks, bonds, securities or of what nature?

A. Stocks.

Q. Did you have any property of your own prior to the time that gift was made?

A. Nothing of any consequence, sir.

Q. Were you married at that time?

A. Yes, sir, I was.

Q. And Mrs. Elsie Jeffcott was your wife and still is? A. Yes, sir.

Q. And from that gift did you pay your living expenses thereafter? A. Yes, sir.

Q. Was the income adequate or was it necessary to use some of the principal?

(Testimony of David C. Jeffcott.)

A. It was necessary for me to use some of the principal.

Q. Did you have any other business of any kind?

A. After I became ill, I was not able to work.

Q. When did you first acquire an interest in the ranch [359] you now have?

A. I made a down payment in December, 1936.

Q. And when did you actually get possession of the property?

A. The first of November, 1937.

Q. Now, the ranch, when you purchased it, did it have any cattle on it?

A. No, sir, it did not.

Q. What was the general condition of the ranch as to whether it was in good or bad condition?

A. I would say that it was in an extremely run down condition.

Q. And you took possession of it in the latter part of 1937?

A. Yes, sir.

Q. From whom did you purchase that property?

A. From the Chiricahua Ranches Company.

Q. What was the total consideration you paid for the ranch alone without any stock?

A. Fifty thousand dollars.

The Court:

Q. How much?

A. Fifty thousand dollars.

Q. Was that for the ranch itself?

(Testimony of David C. Jeffcott.)

A. Yes, just the bare ranch.

Mr. Robertson:

Q. Have you any brothers?

A. I have an older brother.

Q. Is he also engaged in the ranching business in this state? [360]

A. He is working on a ranch at the present time.

Q. After you took over the property, just tell the court what you undertook to do during the next year; that would be the year of 1938.

A. May I change that to start in 1937?

Q. Yes.

Q. Because, while I did not get possession of the ranch until late in 1937, we were permitted to go on the property and make certain improvements during that summer, the summer and fall of 1937. It was necessary first to provide adequate living quarters for my wife and child; to provide living quarters for the ranch and farm hands I would need; to repair extensively the fences; to build barns of adequate size to handle the type of cattle we wished to have on the ranch; to work up farming lands, which we saw as a very good opportunity of helping the ranch make an income, and which had in the older days been worked to some extent, but during the time the ranch was held by the Chiracuhua, I imagine it had not been used for anything.

Q. You mean the farm lands?

(Testimony of David C. Jeffcott.)

A. Yes, the farm lands, and then of course we had to stock with cattle. We were forced to buy from the Chiracuhua Ranches Company cattle. The Forest Service forced us to buy cattle from the Chiricuhua Ranches Company from an entirely different range, because the Chiricahua would not sell us the cattle that were on the ranch at that time.

[361]

The Court: I take it that this testimony is for the purpose of showing the financial condition of the parties a year or two years later.

Mr. Robertson: That is correct, your Honor.

The Court: At the time of the operation?

Mr. Robertson: Yes, sir.

A. That purchase of cattle, the original stocking cost me—I do not mean the original stock, but the primary stocking—the first cattle we bought came on the ranch in the fall of 1937. However, as I recall, there were only something like three hundred and fifty head of cattle, which is far from sufficient to make an adequate income for almost anybody. Also in 1937, we bought forty-two head of Registered Hereford cows and two registered bulls from Wyoming, to raise our own range bulls and thereby save the continued cost of purchasing range bulls to take care of our commercial cattle.

Mr. Robertson:

Q. Just more or less give us the high spots of the development of the ranch, say, up until June of 1939. [362]

(Testimony of David C. Jeffcott.)

A. In the fall of 1938, we purchased additional range cattle to bring on the ranch, to put on the ranch. That constituted our entire purchases in our commercial herd. In the fall of 1938, we purchased some additional registered cattle from the Greene Cattle Company, old cows, which we figured on keeping one year and get one calf from them and then sell them. Of course it was necessary to buy horses, farm machinery, lots of barbed wire, new posts, and a multitude of things that cost money, and there is no way of getting around it.

Q. Did you incur any expense in rehabilitating the farm land?

A. In buying the ranch and making those improvements and necessary improvements in almost all cases, I used up all of my own money, the money given me in 1935, or stocks that had been given to me, and I was forced to borrow additional money from my father.

Q. Did you have an arrangement with your father as to borrowing sufficient money to get the ranch on a productive and earning basis?

A. Yes, sir, from the beginning it was an understanding that my father was willing to help me to a certain extent in trying to get started.

Q. By helping you, do you mean giving you money or loaning it to you?

A. Loaning it to me. However, that was not set up in a businesslike manner until the early part of 1939, when the [363] amounts became increas-

(Testimony of David C. Jeffcott.)

ingly high, and I think it was about August of 1939 that, at that time, we had worked up and signed a mortgage on the ranch, chattels and everything we had, in favor of my mother.

Q. Prior to the time you actually executed the note and secured it by a mortgage, did you have any arrangement or understanding with your father that that would eventually be accomplished?

A. Oh, yes, sir.

Q. As soon as you determined the necessary amount of money to start the ranch?

A. Yes, even when it was set up, those additional loans were set up in there, covering the following eighteen months or two years, even after the mortgage was signed.

Q. The mortgage, as I understand it, was executed when?

A. To the best of my knowledge, it was approximately the early part of August, 1939. We had been working on it for eight or ten months previous to that.

Q. You say your mother is the mortgagee?

A. Yes, sir.

Q. What are the provisions of that mortgage as to the amount of money to be charged as interest?

A. Three and one-half percent per year.

Q. Do you know, Mr. Jeffcott, whether or not that is in keeping with the interest charged by the Federal Cattlemen's Loan Bank? [364]

Mr. Allen: Object to that as immaterial and hav-

(Testimony of David C. Jeffcott.)

ing no bearing on the issues in this case. This does not enter into the picture. I fail to see the relevancy of it.

The Court: The interest on the obligation is three and one-half per cent?

Mr. Robertson: I propose to show it is the same rate of interest he would have to pay someone else not connected with his family. Mr. Allen brought the family relation into the case, and I want to show this is a strictly business arrangement, and not a gratuitous this—a businesslike arrangement for the repayment of this money.

The Court: The bona fides of the transaction would not be based on some other concern loaning money at the same rate.

Mr. Robertson: Except as to the operating expenses of his ranch and the reasonableness of the rate.

The Reporter: (Reading)

Q. Do you know, Mr. Jeffcott, whether or not that is in keeping with the interest charged by the Federal Cattlemen's Loan Bank? [365]

The Witness: I think counsel means the Farm Land Bank, which is a part of the United States government.

Mr. Robertson: That is correct.

A. The answer is yes. The mortgage was set up following the provisions of the mortgages of the Federal Land Bank.

Q. Does it provide for an amortization of the

(Testimony of David C. Jeffcott.)

principal in keeping with the requirements of the Federal Land Bank?

A. Yes, sir, it does.

Q. What are the provisions for amortization of the principal of that loan?

Mr. Allen: That is objected to as immaterial, if your Honor please.

The Court: This pertains to the loan that is on this property?

Mr. Allen: Objected to on the further ground that the mortgage is the best evidence and speaks for itself. I do not object to his outlining his condition, but if he is going into the details of a mortgage, I object on the ground that it is not the best evidence. [366]

Mr. Robertson:

Q. I shall simply ask you a general question, Mr. Jeffcott, or, rather, I think you have already testified the mortgage provides for amortization of the principal? A. Yes, sir.

Q. When did you first set up your books on a permanent basis in connection with your ranch operation?

A. They were audited by the same firm of auditors that worked out this financing proposition, on June 30, 1939.

Q. June 30, 1939?

A. That was the date of their audit.

Q. Do you have accurate and complete records for the years of 1937, 1938 and the first half of 1939?

(Testimony of David C. Jeffcott.)

A. The records are accurate, I believe, but it is difficult to put them on the same plane as my records for the second half of 1939, 1940 and 1941, because of the nature of the accounting system at that time.

Q. I will ask you if you have made a search of the records you have for 1938 and 1939, 1940 and 1941? A. Yes, sir.

Q. Can you state your gross earnings, or gross receipts, for the year 1938?

Mr. Allen: I object to this on the ground the record is the best evidence. He testified he has a complete and accurate record. [367]

Mr. Robertson:

Q. Mr. Jeffcott, do you have any memorandum that you have prepared yourself from your account books and records? A. Yes, sir.

Q. And are these figures taken from the original books or entries? A. Yes, sir.

Q. And you have prepared this memorandum yourself? A. Yes, sir.

Q. Have you it with you?

A. Yes, sir.

Q. Using that memorandum to refresh your recollection will you state your operating income for 1938?

Mr. Allen: I object to the use of a memorandum here, secondary evidence, when it is apparent here that the primary evidence is available.

Mr. Robertson: It is not available. This witness

(Testimony of David C. Jeffcott.)

has first-hand information, and has a memorandum he has prepared himself from those books of record, and it is absolutely competent to prove such a state of facts.

Mr. Allen: I think the rule is if a witness desires to refresh [368] his memory, he may refer to the entries made at the time the transaction occurred, and not from notes prepared thereafter.

The Court: If the witness knows personally what his income has been, he may specify.

Mr. Allen: He is asked to refer to some secondary evidence and give it.

Mr. Robertson: I said for the purpose of refreshing his recollection.

The Court: The objection is good on the grounds urged by counsel. If this witness can testify irrespective of the books what his income was, he may do that.

Mr. Robertson:

Q. Do you have knowledge of what your income was for the year 1938?

Mr. Allen: I object to the further reference to this secondary evidence, this memorandum, if he is going to refer to it or if he has referred to it.

The Court: The books, as a matter of original records, should be [369] here.

Mr. Robertson: Very well. I at this time move for an adjournment until Monday morning at which time we will produce the original books.

Mr. Allen: May I suggest we continue the

(Testimony of David C. Jeffcott.)

examination to the hour indicated by the court.

Mr. Robertson: I think that as an attorney before this bar, I certainly have the right to present my case in the order I may select. It may not be the best, but I prefer it that way, and I ask that we adjourn until ten o'clock Monday morning.

The Court: I indicated earlier that we would recess over to Monday morning.

Thereupon, the court was recessed to convene again at ten-fifteen o'clock in the forenoon on Monday, February 2, 1942; and, at said time, the trial of the case was resumed, with the same appearances as heretofore noted, and the following further proceedings were had.

[370]

ROBERT C. JEFFCOTT

resumed the stand for further examination, and testified as follows, on direct examination:

Mr. Robertson:

Q. Mr. Jeffcott, handing you a document marked Defendants' Exhibit A for Identification, will you please state what that is?

A. This is a summary of the figures taken from my books, being details of each of the extensions and individual items.

Q. Do you have the original records with you in court? A. Yes, sir.

(Testimony of Robert C. Jeffcott.)

Q. This is a recapitulation of totals taken from these books? A. Yes.

Mr. Robertson: I request the witness be permitted to use Defendants' Exhibit A for Identification in connection with his testimony, for the purpose of explaining his testimony.

The Court: The original books are present and will be available?

Mr. Robertson: Yes.

Mr. Allen:

Q. Who made the recapitulation, Mr. Jeffcott?
[371]

A. I did.

Q. You made that yourself? A. Yes.

Q. You compared these figures to your original books?

A. Yes, they were prepared from those books, and checked against those books.

Mr. Allen: No objection to using the summary.

The Court: Very well.

Mr. Robertson:

Q. Can you state what your income was, Mr. Jeffcott, from ranch sales for 1938?

A. Yes, sir, thirty-seven hundred fifty-eight dollars and thirty-seven cents.

Q. Did you have any increase in cattle inventories as of that date, or for that year?

A. Increases from purchases only; no natural increase.

(Testimony of Robert C. Jeffcott.)

Q. Do you keep your books on a cash or accrual basis?

A. In 1937 and 1938, and I think 1939, they were kept on a cash basis.

Q. Do the figures on Exhibit A carry forward the totals of the accrual then?

A. Yes, sir, inasmuch as there was no natural increase in our cattle inventories during 1937 and 1938, they show in 1939, and from then on. [372]

Q. So, for the year 1938, can you state the total income from sales of cattle, together with your natural increase, of which you say you had none?

A. \$3758.37.

Q. And what were your ranch expenses for that year? A. \$18,330.74.

Q. What loss did you have from your operations of the ranch for that year? A. \$14,572.37.

Q. Did you receive any dividends during that year?

A. Yes, I received dividends in the amount of \$403.22.

Q. And will you please state what were your personal expenses for that year?

A. \$15,572.72.

Q. Was any portion of that personal expense for income taxes? A. Yes, sir.

Q. And how did it happen you were required to pay an income tax for that year?

A. I was forced to sell my stocks, those I had remaining, to pay for the ranch and its equipment.

(Testimony of Robert C. Jeffcott.)

Q. And the tax that was assessed was assessed on what basis?

A. The tax was assessed on the difference between the cost to my father or to myself, as the case might have been, and the sale price.

Q. But all of the money received from the sale of those stocks was invested in the ranch, I think you testified? [373]

A. Yes, on the ranch or to help pay our personal expenses.

Q. Can you explain why your personal expenses reached such a high total that year?

Mr. Allen: I object to that as immaterial. I do not see that the reasons for the personal expenditures in 1938 would throw any light on the situation for the court.

The Court: The witness may answer the question.

Mr. Robertson:

Go ahead, Mr. Jeffcott, just briefly.

A. That was our beginning year in the cattle business and the books were not properly set up, and a great deal of ranch expense found its way into our personal expense account.

Q. What were your ranch purchases?

A. You mean for that year?

Q. Yes. A. \$13,362.64.

Q. In 1939, what was your income from ranch sales? A. \$6183.61.

Q. Was there an increase in your cattle inventory for that year? A. Yes, sir.

(Testimony of Robert C. Jeffcott.)

Q. What did that increase amount to?

A. \$10,749.21. [374]

Q. So your total of increase from cattle inventory and income amounted to what?

A. \$16,932.82.

Q. What were your ranch expenses for that year?

A. For 1939? \$17,362.91.

Q. And what loss do your books show for that year?

A. \$430.09.

Q. What were your personal expenses for 1939?

A. \$12,983.47.

Q. Can you explain in what way that came about?

A. Yes, sir, our normal expenses since then have run approximately six thousand dollars, between six thousand and sixty-five hundred dollars. The difference was caused principally because of Robert Crawford Jeffcott, II.

Q. You mean for medical and hospital expenses?

A. Yes.

Q. Included in that was the twenty-five hundred dollars paid to Dr. Donovan?

A. Yes, sir.

Q. For the year 1940, what was your income from ranch sales?

A. \$11,548.06.

Q. And your increase in cattle inventories amounted to what?

A. \$3,010.04.

Mr. Allen: I would like to interpose an objection at this time that the year 1940 and subsequent years are not material to [375] the issues of the case, in that the obligation was incurred in 1939, and the fee was determined in 1939, and the finan-

(Testimony of Robert C. Jeffcott.)

cial circumstances of the Jeffcotts in 1939 are material, but of subsequent years is not material.

Mr. Robertson: If the court please, one of the most important questions in this case is the true financial condition of Mr. Jeffcott. We find from the testimony that he started purchasing the ranch in 1937. In 1938 he completed his cattle purchases and was getting his ranch on a paying basis. It is my purpose to prove to the court that this cattle ranch was not a plaything, but an actual business enterprise, and I can state to the court that the figures for 1940 and 1941 will be for the benefit of Dr. Donovan. During the first four years of operation of the ranch, it was impossible for Mr. Jeffcott to have any true income. He started in with a plan of five years, during which time he would build up his herd, and sell only his old stock, and at the end of that time he will have a going concern, and will be making a few thousand dollars of actual profit. I do not want it to appear that because he had losses in 1938 and 1939 it is evidence that this business venture, wherein he has all of his money invested, is a plaything, but that it is in fact a business venture.

The Court: I think, of course, the point here in this matter is [376] the financial condition of the defendants at the time this obligation was incurred.

Mr. Robertson: That is true.

The Court: Go ahead with the examination. If it is not material, I can disregard it.

(Testimony of Robert C. Jeffcott.)

Mr. Robertson:

Q. For the year 1940, what was your income from ranch sales? A. \$11,548.06.

Q. And what was your increase in cattle inventories? A. For 1940, \$3,010.04.

Q. And what was the total increase and income for that year? A. \$14,558.10.

Q. How much were your ranch expenses for 1940? A. \$16,341.60.

Q. And your losses amounted to how much for that year? A. \$1,783.50.

Q. What dividends did you receive?

A. \$130.00.

Q. And your personal expenses for the year 1940 were what? A. \$6,305.32.

Q. In other words, Mr. Jeffcott, your personal expenses—in fact, they are kept separate and apart from your ranch books? [377]

A. Yes, sir. They are kept in the ranch books, but kept entirely separate. There is no connection between them.

Q. In 1941 what was your income from ranch sales? A. \$16,585.34.

Q. In 1941, what was your increase in cattle inventories? A. \$9,574.82.

Q. What was the total of that increase and income? A. \$26,160.16.

Q. What was your 1941 ranch operating expense? A. \$27,491.49.

Q. And your losses for that year amounted to how much? A. \$1,331.33.

(Testimony of Robert C. Jeffcott.)

Q. Did you receive any dividends in 1941, and if so how much?

A. \$90.00 I received in dividends.

Q. What did your personal expenses amount to in 1941? A. \$6,277.82.

Q. And now, in connection with 1942, from present indications, assuming that the market stays approximately at its present level, are you able to make any estimate as to what your net profit from ranch operations may amount to this year?

A. Yes, sir, it looks very favorable that we will make between five and eight thousand dollars, net profit, on the ranch.

Q. And your personal living expenses, can you estimate what they will amount to?

A. To the present time, they are going to be a little bit lower, except as this case may turn out.

Q. So it has been your plant, Mr. Jeffcott, to keep building [378] up your herd to the maximum range capacity, and in the beginning, how long did you anticipate that would take you?

A. I took courses at the University of Arizona, and at that time we were informed that to start in the cattle business it would be five years before there would be any income at all. I also got information from several qualified men who said it would be approximately five years before there was any return.

Q. During this time, has it been necessary for you to increase the amount of your mortgage?

(Testimony of Robert C. Jeffcott.)

A. Yes, to buy additional cattle and take care of necessary living expenses, add other things to the ranch and keep it operating.

Q. Can you tell me, as of June, 1939, the amount of the mortgage and the appraised value of your property, or the inventory value?

A. I should like to refer to my books for that.

Q. Very well.

A. July 1, 1939, my equity in the ranch was \$79,613.91.

Q. How did you arrive at your equity? Give us the amount of your mortgage and your inventory value.

A. The amount of the mortgage as of that same date was \$69,500.00. The auditors at that time figured that the value of my equity in that ranch at the end of 1942 would be \$110,500.00, not including the value of the land and fences, forest permits and buildings, which [379] would have a book value of approximately \$100,000.

Q. Now, can you give us the present amount of the mortgage and your present inventory value of the property?

A. At the present time the mortgage on the ranch amounts to \$128,292.37, with my equity at \$57,667.19, and the total assets on the ranch amounting to \$199,900.26.

Q. During the year of 1939 and the years of 1940, 1941, and up to the present time, did you have any other source of income whatsoever?

(Testimony of Robert C. Jeffcott.)

A. None other than has been mentioned, from the dividends.

Q. Which amounted to?

A. In 1939, it amounted to \$130.00; in 1940 I got \$130.00, and in 1941, it amounted to \$90.00. Excuse me, sir. I believe there was one point—I do not remember the year—when I had \$25 more from my services as a trustee on a trust which had nothing to do with me. I was merely a trustee.

Q. Were you one of the beneficiaries under the trust? A. No, sir.

Q. Prior to 1939, what experience had you had in paying medical fees to doctors in New York City?

A. My personal experience has been very limited.

Q. Well, for yourself or members of your family that you have actual personal knowledge of the amount of fee paid, and the nature of the operation.

A. I remember an operation that my father was forced to have—I think it was in the year 1934—when he was operated on [380] for fistula of the anum, or some such thing. He was operated on three different times during his stay in the hospital, from four to six weeks, by the man who had been chief surgeon to the King of Belgium.

Q. Do you know what hospital he was connected with in New York?

A. Presbyterian Medical Center.

Q. Do you recall the name of the doctor?

A. No, sir.

(Testimony of Robert C. Jeffcott.)

Q. Do you know the amount of the fee he charged for the three operations?

Mr. Allen: I want that answer "yes" or "no", because I wish to make an objection.

A. Yes, sir.

Mr. Robertson:

Q. Will you state that amount?

Mr. Allen: I object, your Honor, as being an isolated instance, and throwing no light on the issue before the court whatsoever.

Mr. Robertson: It is a field of inquiry opened up by the plaintiff's counsel in his original examination of Mr. Jeffcott as to what his experience had been in paying fees to doctors in New York. [381]

Mr. Allen: I do not think, if the Court please, I examined the witness as to what fees he might have paid, but as to what he knew of the customs in and around New York as to charges for services of surgeons in that locality. That is one thing, but what one surgeon might have charged for a series of three operations is another thing. He might have given the operations to defendant's father or might have charged one hundred dollars, and that would throw no light on whether or not this witness is acquainted with the custom of New York surgeons. It is an objection that goes to every question that seeks to prove knowledge of an isolated case.

Mr. Robertson: It is the only way in the world that one could get information.

The Court: Of course the operations were not comparable. One was on an adult and the other on

(Testimony of Robert C. Jeffcott.)

the intestines of an infant a few days old. The question may be answered.

A. One thousand dollars.

Mr. Robertson:

Q. For the three operations.

A. For the three operations.

Q. What other experience or knowledge do you have as to fees [382] charged by New York surgeons.

A. My mother was operated on within the last two years, presumably for breast cancer, by a doctor in New York.

Q. What was his name?

A. Dr. Auchincloss.

Q. And was the breast removed in the operation?

A. No, sir. That is the reason I said "presumably". The doctor spent a great deal of time determining whether it was or was not a breast cancer. There was an operation done which I understand was very severe, but the nature of the operation I cannot tell.

Q. What was the charge for that?

Mr. Allen: Same objection. It has no comparable bearing on any issue in this case. It is an attempt to prove by isolated instances general knowledge, and furthermore it has no bearing upon the specialized service provided here and no relation to the examination of this witness on cross, under the rule, because of the fact that he was there interro-

(Testimony of Robert C. Jeffcott.)

gated as to the custom on the part of an eminent specialist.

The Court: The question may be answered.

A. Three hundred and fifty dollars.

Mr. Robertson:

Q. Do you have any other knowledge as to fees charged by [383] New York surgeons?

A. I have no other knowledge that I could be sure of, sir, among New York surgeons.

Q. Mr. Jeffcott, can you tell us what fees you paid for the services of Dr. Thompson?

Mr. Allen: If the court please, I object to that as immaterial. It has no bearing on any issue in this case.

The Court: Yes, I think the objection is good. I have been inclined to allow a good deal of latitude, but I think that is not material.

Mr. Robertson:

Q. For the sake of the record, what fee did you pay to Dr. William D. Carrell?

Mr. Allen: Same objection.

The Court: Objection sustained.

Mr. Robertson:

Q. What fee did you pay Dr. Vivian Tappan for consultant services?

Mr. Allen: Same objection. [384]

The Court: Same ruling.

Mr. Robertson:

Q. What fee did you pay Dr. Victor M. Gore for his services?

(Testimony of Robert C. Jeffcott.)

The Court: You are speaking of physicians that treated the infant in this case?

Mr. Robertson: They were all in attendance.

The Court: At the same illness?

Mr. Robertson: Yes, the same illness.

The Court: What is your objection, Mr. Allen?

Mr. Allen: In the first place, it is wholly immaterial what he expended on the infant in connection with this operation or the illness or the surgical condition of the infant, in that it can have no earthly bearing upon the reasonableness of the charge in issue before the court. The witness has testified that he expended during that ear something in the neighborhood of six thousand dollars in- [385] cident to that illness on the part of the infant child, of which twenty-five hundred was paid to this plaintiff.

The Court: It might be material to this extent, in the matter of determining how much of the outlay in connection with the operation was for fees of physicians—it might have some bearing.

Mr. Allen: I make one further objection. I object further that the witness having testified to that extent, can only seek to testify as to the items paid to these various local physicians or surgeons as having a bearing on the fee charged by this plaintiff. Since he has testified as to the total, it can only be for the prejudicial purpose of making a comparison. None of them are shown to be specialists, but are shown to be otherwise, and none were

(Testimony of Robert C. Jeffcott.)

called here from some other field of practice. In view of that situation, I object because it is an effort to make a comparison between the fees charged by local physicians and the fee charged, but not paid to the specialist in the case.

Mr. Robertson: All of these objections go simply as to the weight.

Mr. Allen: I want the objection in the record. [386]

The Court: The question may be answered. I think your position is correct, Mr. Allen, but the additional expense in connection with the illness or mal-formation of this baby and all of the expense attending that may be material. For that reason, I will permit the witness to go ahead.

Mr. Robertson:

Q. Going back, Mr. Jeffcott, will you state what fee was paid to Dr. William D. Carrell for services performed in connection with the illness of the baby and for the delivery of the baby and continuing services after that?

A. As a total, two hundred dollars.

Q. And what fee was charged by the Desert Sanatorium for the services of Dr. Hugh Thompson?

A. Dr. Thompson's services are included in the price of the room. There is no separate charge for the doctor.

Q. What fee did you pay to Dr. Victor Gore?

A. Forty dollars.

(Testimony of Robert C. Jeffcott.)

Q. And to Dr. Vivian Tappan?

A. Two hundred dollars.

Q. For how long a period of time, beginning with the day of the birth of the child, did Drs. Thompson, Gore and Tappan render services on behalf of the child, or to the child?

Mr. Allen: Now, I make the same objection, on the ground it is for the purpose of establishing a prejudicial comparison. [387]

Mr. Robertson: Every element that went into this matter and the consideration these various doctors gave to the financial condition of these parents, are elements that enter into the conditions surrounding this case. Mr. Allen seems to have in mind that Dr. Donovan is the only specialist in the only line of medicine where they have a specialty, and therefore evidence on his line is the only evidence admissible in this case. The law is that the opinion of anyone who knows anything concerning the general nature of this operation, taking into consideration the ability of the doctor, his experience, his skill, his standing, the time he had to devote to this case, the nature of the operation, and all of those matters go into the determination of the case, and Dr. Gore and Dr. Carrell will be called to testify here as to their opinion as to whether or not the fee is reasonable.

The Court: The last question was how much time each of these physicians gave to the baby since the operation?

(Testimony of Robert C. Jeffcott.)

Mr. Robertson: Yes, to show the reasonableness of their charge.

Mr. Allen: Certainly that is the purpose, and that is what makes it prejudicial. He cannot attempt to show the state of mind of three or four local physicians by the testimony [388] of this witness. That is a very novel theory indeed. The question was not the time they spent on the operation, but the time they spent for the fees they charged. In other words, it is that effort to make a comparison which I think is highly prejudicial.

Mr. Robertson: It certainly is, because I shall show the qualifications of these men and in their particular line it will closely approximate that of Dr. Donovan, and I intend to show the time they spend in attendance upon that baby, and the fees they charged.

The Court: Objection sustained.

Mr. Allen: Furthermore, the matter of the original fee can only be introduced in two ways—upon the knowledge of someone who observed the service, or the opinion of some expert.

The Court: The ruling has been made, Mr. Allen.

Mr. Robertson: Very well, you may cross-examine. [389]

Cross Examination

By Mr. Allen:

Q. Now, as I understand it, Mr. Jeffcott, you got your start in this cattle ranching business pri-

(Testimony of Robert C. Jeffcott.)

marily from a seventy-five thousand dollar gift from your father in 1935. Is that correct?

A. Yes, sir.

Q. In other words, that gift provided you with the primary funds from which you initiated that ranch program?

A. The primary funds might have been our small savings account.

Q. And if that were true, then the secondary fund was your father's gift. Is that what you mean?

A. I don't think it makes a great deal of difference.

Q. That is what I thought. Then you started out there originally with a program of development on this cattle ranch and as you needed money in the course thereof, you secured it from one or both of your parents, did you not, Mr. Jeffcott?

A. Yes, sir.

Q. And, as you have testified on direct here, aside from some very small amounts of dividends which you received during the past four or five years, all of the money that you have spent has come from your parents, other than these sales from the ranch which you mentioned?

A. I believe it was brought out in my testimony the first day that I had also borrowed from the bank. [390]

Q. And who repaid the banks, if anyone?

A. The banks are still carrying the loan.

Q. What is the amount you owe the banks?

(Testimony of Robert C. Jeffcott.)

A. Five thousand dollars open account.

Q. And the rest of your indebtedness at the present time then consists of \$128,000, in round figures, that you owe your mother. Is that correct?

A. Yes, indebtedness on the ranch.

Q. And it is true, is it not, that prior to the time Dr. Donovan's bill was mailed to you and received by you, you had no mortgage on that property in favor of either your mother or your father?

A. That statement is correct; however, we had started work long before that baby was born, on a set-up that would be satisfactory to everybody concerned.

Q. Now, how much interest have you paid to your mother since you placed the mortgage on your ranch in her favor?

A. It would be three and one-half per cent since the mortgage has gone into effect to my mother, and previous to that, there was interest to my father at the rate of five per cent.

Q. And the manner in which it has been paid is to increase the total amount of the indebtedness?

A. I have paid them—actually, of course, I have had to borrow in addition to take care of the ranch expenses, of which that would be one, to augment by cattle sales.

Q. In other words, these living expenses—I withdraw that. [391] The personal expense of \$12,983.47 in 1939, approximately \$15,000 in 1938, in excess of \$6,000 in 1940, and in excess of \$6,000 in 1941, so

(Testimony of Robert C. Jeffcott.)

far as that actual cash is concerned, came to you and you were able to expend that by virtue of further advances by your parents. That is correct, is it not?

A. Yes. It is a little hard to know which pocket it came out of, but that is the truth of it.

Q. That is the point I wanted to make clear, Mr. Jeffcott.

A. I also want to add that since August, for the first time since I have been in that business, I have had to borrow no further money.

Q. Had you had the occasion, in the development of this ranch program, or your living expenses, or your ranch expenses, to need further funds, you assume, do you not, that you might have further increased your mortgage indebtedness to your parents?

A. I suspect there comes an end to all good things, sir. My father has been very generous, but he is not by any means the wealthiest man in the world, and he does get strapped once in a while.

Q. Do you anticipate that out of the \$5,000 which you expect sometime to make out of this ranch as an annual profit, during your lifetime, to retire the indebtedness of \$128,000?

A. If I live sixty-eight years.

Q. How long? [392]

A. Sixty-eight more years.

Q. What are you going to live on in the meantime?

(Testimony of Robert C. Jeffcott.)

A. I believe my letter that you are taking those figures from said the expectancy I had for the next few years was only five thousand dollars. It is our expectation that our ranch will do considerably better than that; otherwise, I wish to sell my ranch.

Q. Now, you have only one brother, have you not? A. Yes, sir.

Q. And you and that brother are heirs to a substantial fortune, are you not?

Mr. Robertson: Just a moment, if the Court please. I object to the question for the very obvious reason that Mr. Jeffcott's father is under no legal obligation whatsoever to leave his money to Mr. Jeffcott and his brother or either of them, and Mr. Allen's supposition is remote.

Mr. Allen: I withdraw that, but I want to add an explanation, or I want to say in resistance to the objection that it all goes to the true financial condition of this witness, and his true financial position. Counsel for the defense and the defendant have dwelt at great length on that subject, and I want to go into that further picture as indicated by the attitude of his parents who set him up in a ranching business of approximately two hundred thous- [393] and dollars. He says if he lives sixty-eight years, he may pay back the present \$128,000.

The Witness: Plus interest.

Mr. Allen: I want to go into the question of the possibility he might not have to pay it back.

Mr. Robertson: The possibility is admitted.

(Testimony of Robert C. Jeffcott.)

The Court: This relationship between the witness, the defendant in this case, and the one to whom this indebtedness is due is before the court. How much further can you go in the matter, Mr. Allen? The relationship between this defendant and the man to whom this indebtedness, this sum, is due for advances on the mortgage, is the relationship of father and son, isn't that all?

Mr. Allen: I withdraw the question in order to save time in the matter.

The Court: I do not see the necessity of going into the ramifications. The implication is apparent as to the relationship and the establishment of the indebtedness. If there is some other [394] purpose, all right.

Mr. Allen: No, I just thought it had some connection with the financial condition of the defendant which is in issue here.

Q. Now, Mr. Jeffcott, by the early part of 1938, you had this ranch program planned and under way? That is correct, is it not?

A. The early part of 1938, sir, even though I had studied at the University of Arizona trying to equip myself to handle this job, in the early part of 1938 I had only been in it two months and it is difficult to say I had planned it. I had a general idea.

Q. You had set the goal of accomplishment at that time? A. Yes, sir.

Q. And, having that goal established, then on or about the 31st day of March of that year, you be-

(Testimony of Robert C. Jeffcott.)

came confronted, did you not, with a very serious condition on the part of your new-born son?

A. I believe you stated 1938 as being the goal year.

Q. I said March, 1939.

A. Yes, quite a problem.

Q. That was the situation that confronted you there when you were forced to decide what you were going to do for the alleviation of what you appreciated and realized to be a very serious condition on the part of your infant son? [395]

A. Are you speaking about the human element rather than the financial element at this time?

Q. Yes, sir. A. Yes.

Q. At that time, March 31, 1939, you had a more complete understanding of what was ahead of you in your ranch program than you had had the year before? A. It was bound to be so.

Q. And notwithstanding that situation you employed Dr. Donovan to come here from New York City to perform the needed operation, without making any negotiations in advance as to the fee. Is that correct?

A. I believe I have already testified to the fact that when Dr. Thompson asked me if money was any consideration or object—I do not remember the word—I replied to the effect that of course not, within reason; that it should not cost more appreciably to have the doctor come here than to take the baby, doctor and nurse in an airplane to New York City.

(Testimony of Robert C. Jeffcott.)

Q. And you also testified, that you might have made those statements to Dr. Thompson, but you were sure you had them in your mind. That is true, is it not?

A. I suppose, after four years or three years it is very difficult for one to know exactly what word he did use.

Q. And didn't it occur to you that in negotiating for Dr. Donovan's employment, you were seeking this rather unusual and special service when you changed your mind [396] and asked that arrangements be made for him to come to Tucson rather than you to go to him?

A. No, that did not occur to me as being particularly unusual. I had heard of many cases happening and I had also had some idea as to that I presumed such services were worth, what the doctor's fees might be.

Q. And you negotiated that employment arrangement without it ever occurring to you that you should either ascertain what it was going to cost you, or pay reasonably what it was worth?

A. My time was very limited, Mr. Allen, in that proposition. I was entirely in the hands of men who knew what they were doing. I knew nothing whatsoever about that. It is really quite disheartening when a doctor lets you down that way. I am not referring to Dr. Donovan but to the doctors who gave me the advice. Those doctors knew my situation thoroughly.

(Testimony of Robert C. Jeffcott.)

Q. And of none of those doctors did you make any inquiry as to what the fee might be?

A. I have testified to what I believe I told Dr. Thompson.

Q. But if you did make that statement to Dr. Thompson, that covers whatever inquiry or statement you may have made as to the fee?

A. Perhaps when you have a baby in that condition you are not quite compos mentis.

Q. I appreciate that, but please give an answer to the question. Let us put it this way: That if you did make [397] that statement to Dr. Thompson, then all you did with reference to a determination of what it was going to cost you was just that statement?

A. Yes, sir, in that limited time, yes.

Q. And you stated in one of your letters to Dr. Donovan now in evidence, when you sent him a check for twenty-five hundred dollars, that you were sending that to relieve your conscience. Isn't that correct?

Mr. Robertson: I suggest the witness be shown the letter, if the Court please.

The Court: All right.

Mr. Allen: I refer to the second page, final paragraph, of Plaintiff's Exhibit 3 in evidence.

A. Shall I read it?

Q. Yes.

A. (Reading) "I feel very unhappy that any question of cost should enter into what you did for

(Testimony of Robert C. Jeffcott.)

our baby. And it seems to me unappreciative that you should not promptly have received any payment, so I have managed to secure the highest figure the local doctors named and enclose herewith check for \$2500. We have thereby freed our consciences and if you choose to sue for any more I cannot [398] help it for I have done my best and my situation has been explained to you. Of course, if things ever broke right for me and I could properly afford it, I would like to do some more for you in order that you would think as well of us as we did toward you." Yes, sir.

Q. In other words, your payment was made out of regard, apparently, from that letter, for the consciences of your wife and yourself in that regard?

A. In which regard?

Q. In regard to the consciences of yourself and your wife.

Mr. Robertson: I submit that the entire paragraph is very clearly and lucidly written, and I think it speaks for itself without digging out any one word out of the entire sentence.

The Court: The witness may answer the question.

A. I think "consciences" in that sentence refers to not having paid Dr. Donovan anything on that account at a previous date.

Mr. Allen:

Q. And since you have paid him twenty-five hundred dollars, you have had no qualms of conscience about his charge?

(Testimony of Robert C. Jeffcott.)

A. May I make it clear, Mr. Allen, that we very much appreciated, and still appreciate, what Dr. Donovan did for [399] our child, but to people of our means, when you receive a bill through the mail for \$12,500.00 it really comes up and slaps you in the face, and at first you think "Gee, are we completely crazy", and as you come to think of it more, you begin to inquire from other people, because everyone's decision are based, as a rule, upon talking it over and getting other peoples' ideas. I have talked it over at considerable length, and we find now that our consciences should be clear.

Q. In other words, having discussed it to your satisfaction, you feel that you have fully paid for the services which you received?

A. Yes, sir, I do.

Q. That is what I wanted to know. Now, you had talked it over before you referred it to a relative of the family in New York hadn't you?

A. You mean talked over the——

Q. You had carried on these conversations to attempt to determine what you should regard as a reasonable fee? A. That is right.

Q. And did you give this relative of yours any instructions as to what amount he should offer in attempting to settle this difference with Dr. Donovan?

A. As I recall, sir, I did not. I believe that I kind of put it in his hands with the full understanding of the case and the things that were involved

(Testimony of Robert C. Jeffcott.)

in that, and I don't think I ever told him any figure. [400]

Q. Then you did not instruct him to negotiate with Dr. Donovan on the basis that one thousand dollars was all that you could rake and scrape together under the circumstances?

A. I think Dr. Hamblin was very well acquainted with our circumstances.

Q. You did not instruct Dr. Hamblin to deal with Dr. Donovan on the basis that a total of one thousand dollars was all you could rake and scrape together under the circumstances?

A. No, sir, I did not.

Q. Then, if Dr. Hamblin negotiated with Dr. Donovan on that basis, it was not the result of your instructions? A. That is correct, sir.

Q. Now, with reference to Dr. Donovan's offer to settle this matter with you for \$7500.00, it is true, is it not, that at the time he made that offer to you he advised you he would then settle for \$7500.00 if you paid it immediately?

A. You mean that Dr. Hamblin advised me that if we paid Dr. Donovan immediately it would be all right?

Q. Yes.

A. Yes, I believe that that advice came through at some later date following the conversation.

Q. Dr. Donovan, in other words, in connection with that \$7500.00 offer, made it plain to you that the offer was made if he could get an immediate or early settlement [401] of the matter?

(Testimony of Robert C. Jeffcott.)

A. It is quite some time since I have had an opportunity to refresh myself on that letter, sir, but I believe that is correct.

Mr. Allen: No further cross, your Honor.

Re-direct Examination

By Mr. Robertson:

Q. Mr. Jeffcott, the gentleman who saw Dr. Donovan in New York on your behalf, I believe was a doctor himself, wasn't he? A. Yes, sir.

Q. You say you did not suggest the figure of one thousand dollars? A. No, sir, I did not.

Q. So far as you know, then, the figure of one thousand dollars was his own idea as to the reasonable value of these services?

A. Yes, sir, so far as I know.

Q. Now, just what did you think this fee would probably amount to?

Mr. Allen: Just a moment. I object to that, your Honor. In fact, that has been up once before in this case and the objection was sustained. [402]

Mr. Robertson: I appreciate that fact and know the Court's ruling was against me, but on the matter of what Mr. Jeffcott had in mind and why he did not exert himself to get hold of Dr. Donovan more than he did, his answer is perfectly admissible, not as evidence as to the reasonableness of the fee, but to explain his conduct as to why he did not insist upon a more definite arrangement.

The Court: The court has read over that question here earlier in the record, and I don't think it

(Testimony of Robert C. Jeffcott.)

has any bearing at all on determining the reasonableness of the fee.

Mr. Robertson: I concede that entirely because that has to be established by expert testimony and the relationship of the party has been brought out.

The Court: The objection will be sustained.

Mr. Robertson:

Q. In connection with this mortgage that is held by your mother, Mr. Jeffcott, does it have a provision that enables you to prepay the principal payment?

A. Yes, sir, that can be paid off just as rapidly as I am able to. That is the understanding.

Q. Does your mother exact partial release of that mortgage [403] if you sell any cattle?

A. Yes, sir, she does.

Q. And the mortgage is of record, is it?

A. Yes, sir.

No. 10251

2

United States
Circuit Court of Appeals
For the Ninth Circuit.

DAVID C. JEFFCOTT and ELSIE JEFFCOTT,
his wife,

Appellants,

vs.

EDWARD J. DONOVAN,

Appellee.

Transcript of Record

In Two Volumes

VOLUME II

Pages 459 to 561

FILED

OCT 12 1942

PAUL P. O'BRIEN,

CLERK

Upon Appeal from the District Court of the United States
for the District of Arizona.

No. 10251

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Upon Appeal from the District Court of the United States
for the District of Arizona.

ELSIE JEFFCOTT

one of the defendants herein, called as a witness on behalf of defendants, and having been first duly sworn according to law to testify to the truth, the whole truth and nothing but the truth, was examined and cross-examined and testified as follows:

Direct Examination

By Mr. Robertson:

Q. Your name is Elsie Jeffcott? A. Yes.

Q. You are one of the defendants in this action?

A. Yes.

Q. Do you recall, Mrs. Jeffcott, when you first met Dr. Donovan?

A. Immediately preceding the operation.

Q. And where was that? A. In my room.

Q. And that was some seven or eight days after the birth of the baby?

A. I believe it was the eighth day, yes.

Q. And was there more than one person present when he came in?

A. Yes, there was a nurse, and Dr. Carrell and I think [404] Dr. Thompson.

Q. When did you next see him?

A. After the operation.

Q. Where and who was present?

A. It was also in my room. Mr. Jeffcott was there, Mrs. Carrell, Dr. Carrell and Dr. Thompson.

Q. What conversation was had between them and you?

A. Dr. Donovan explained to all of us what he had done to the baby.

(Testimony of Elsie Jeffcott.)

Q. And was that all?

A. That was all.

Q. Was it a long or a very short visit?

A. No, it was short.

Q. When did you next see Dr. Donovan?

A. He came in to say good-bye and told me he was leaving on the plane.

Q. Where was your husband at that time?

A. He was at the ranch.

Q. What conversation did you have with Dr. Donovan at that time?

A. We talked about the flight back, that he would like to see it by daylight, and I said I knew my husband would be very sorry not to see him, that he had planned to get back that day before noon.

Q. What did Dr. Donovan say to that?

A. That he had to go on the eleven o'clock plane, or eleven-thirty. [405]

Q. Do you recall the negotiations or discussions that took place prior to the time Dr. Donovan was called?

A. Very little took place in front of me as I was in bed. I did not hear much of anything.

Q. Can you state whether or not you were in a disturbed frame of mind at the time?

A. Oh, definitely very much so.

Q. And from the objective symptoms would you say that your husband was?

A. Yes, more so than I.

(Testimony of Elsie Jeffcott.)

Q. Upon whom were you relying for advice with reference to what should have been done for the baby?

A. As soon as the baby showed any unusual symptoms, Dr. Thompson was called by Dr. Carrell as being a pediatrician and later on Dr. Thompson asked for Dr. Tappan, and those were the two we relied upon, and, of course, Dr. Carrell.

Q. And whose advice did you accept in employing the nurses? A. Dr. Thompson's.

Q. Did you employ them or did Dr. Thompson employ them for you?

A. Dr. Thompson arranged for them.

Q. Was it your suggestion or Dr. Thompson's that a baby specialist would have to perform the operation? A. Dr. Thompson's.

Q. In other words, he made all arrangements and made the suggestion that Dr. Donovan be employed? A. That is right.

Q. How long was the baby confined to the hospital after the [406] operation?

A. Approximately six weeks.

Q. What was the baby's condition after the operation, that is, when you took over the supervision and care of the baby yourself?

A. His fistula was draining quite a good deal and required a great deal of care in binding and had to be watched.

Q. How long did that condition continue?

A. I believe it stopped draining completely between eight months and a year after the operation.

(Testimony of Elsie Jeffcott.)

Q. Between eight months and a year after the operation? A. Yes.

Q. What is the baby's condition at the present time?

A. He has what they call a ventral hernia.

Q. Does that necessitate any special care?

A. Yes, we have to make for him little corsets which he wears. He has to be protected from falls, running, any activity.

Q. But otherwise, at the present time, the baby is apparently in pretty good shape?

A. Yes.

Q. Do you know whether or not that hernia has to be operated? A. Yes, it does.

Mr. Robertson: That is all. [407]

Cross Examination

By Mr. Allen:

Q. Why did this hernia develop, if you know?

A. I really do not know, Mr. Allen. I think it was first noticed about four or five weeks after he was brought home from the hospital.

Q. That would be somewhere between two or three months following the operation?

A. I cannot say that a doctor noticed it then. I was the first one who noticed that it looked strange. It was not until longer than that it was first noticed by a doctor.

Q. When was it first diagnosed by a doctor?

A. I imagine when the baby was about four and a half or five months old.

(Testimony of Elsie Jeffcott.)

Q. By whom was it diagnosed, Mrs. Jeffcott?

A. Dr. Carrell.

Mr. Allen: No further cross-examination.

Mr. Robertson: That is all. If your Honor please, I have arranged for the various doctors to start coming this afternoon, and if it would be of any advantage to the court or the counsel, I could arrange to start at one-thirty, but at this time I have no further evidence to put on. I have four doctors and I believe by staggering them I can get [408] them all in.

The Court: We have about twelve minutes to go. Suppose we compensate for that by convening at a quarter to two.

Thereupon the court recessed, and convened again at the hour of 1:45 in the afternoon, with the same appearances as in previous sessions.

The Court: Are counsel ready to proceed?

Mr. Robertson: Call Dr. Carrell.

WILLIAM D. CARRELL,

called as a witness herein on behalf of the defendants, having been first duly sworn according to law, to testify to the truth, the whole truth and nothing but the truth, was examined and cross-examined and testified as follows:

Direct Examination

By Mr. Robertson:

Q. Will you state your name, please?

A. William D. Carrell.

Q. Where do you live, Dr. Carrell?

A. Tucson.

Q. What is your profession? [409]

A. Physician.

Q. Are you specializing in any particular type of that work at this time? A. Yes, sir.

Q. Will you state it, please?

A. Obstetrics and gynecology.

Q. And in the course of your work are you doing any surgical work? A. Yes, sir.

Q. What was your background, doctor?

A. Starting how far back?

Q. In connection with your present profession.

A. I went to the University of Illinois; spent to years in pre-medical school at the University of Illinois at Urbana or Champaign. That as from September, 1919, to June, 1921. Then the following fall I entered medical school at the University of Illinois Medical School in Chicago. In 1923, I graduated, received a Bachelor of Science degree

(Testimony of William D. Carrell.)

from that school. I was graduated there in 1925 and received my diploma in 1926, with one year's interneship.

Q. Then where did you commence your practice?

A. Well, following one year's interneship, I took a residency in surgery at Wabash Employees Central Hospital in Decatur. I spent a year as senior surgical resident at that place. Following that I came to Tucson.

Q. When did you come to Tucson? [410]

A. I came to Arizona in September, 1927. I spent seven months in the Indian Service until I decided to locate in Tucson, moving to Tucson about the first of April, 1928.

Q. What has been the scope of your practice since coming to Tucson?

A. On coming to Tucson, I associated myself with an obstetrician by the name of Peterson, Charles A. Peterson; also with Dr. Victor Gore, and I was Dr. Gore's surgical assistant for the next eight years, and carried on my private practice at the same time.

Q. Doctor, did you belong to any honorary societies in college?

A. Yes, sir.

Q. What were they?

A. Alpha Omega Alpha, which is honorary medical.

Q. Since your graduation have you been made a member or fellow of any surgical or medical societies?

A. Yes, sir.

(Testimony of William D. Carrell.)

Q. Will you state them, please?

A. Well, I belong to the local societies, Pima County Society, Arizona State Society, American Medical Society. In 1935 I was made a fellow in the American College of Surgeons. I think it was in 1938—I am not sure of the year—I was made an organization member of the International College of Surgeons. In 1941 I was certified by the American Board of Obstetrics and Gynecology. [411]

Q. Doctor, you are acquainted with Dr. Edward J. Donovan, the plaintiff in this case?

A. I have met him.

Q. Was the occasion of your meeting him the time he came out from New York to operate on the Jeffcott baby?

A. It was.

Q. Did you witness the operation, doctor?

A. I did.

Q. Did you discuss the operation before and after the performance of the operation, with Dr. Donovan?

A. Yes.

Q. Do you know the condition of the patient prior to the time the operation was performed?

A. Yes, sir.

Q. I believe you delivered the baby, did you not?

A. Yes.

Q. And were in attendance upon the mother?

A. That is right.

Q. Drs. Thompson and Tappan were the pediatricians in charge of the baby itself?

A. That is right.

(Testimony of William D. Carrell.)

Q. And your collaboration with them was incidental to your employment? A. That is right.

Q. Do you know the condition of the baby after the operation? A. Yes, sir.

Q. You have personal knowledge of his condition before and [412] after the operation?

A. I do.

Q. And you have personal knowledge of the operation that was performed? A. I have.

Q. Do you have any exact knowledge, doctor, as to the standing or qualifications of Dr. Donovan?

A. You mean——

Q. Not in detail, but generally.

A. My understanding is that he is a very good surgeon.

Q. Practicing in New York City?

A. That is right.

Q. Now, doctor, what was the nature of the operation?

A. The operation was for the correction of a congenital volvulus which resulted in an obstruction.

Q. Is that an operation which might be termed a major surgical operation? A. It is.

Q. Is it a serious operation from the standpoint of the probability of the patient recovering?

A. Yes, sir.

Q. Are there other operations, doctor, in the field of medicine of equal or greater gravity?

A. Yes, sir.

(Testimony of William D. Carrell.)

Q. Do you have personal knowledge of such operations? A. Yes, sir.

Q. Have you seen them performed? [413]

A. Yes, sir.

Q. Have you performed them yourself?

A. Yes, sir.

Q. Doctor, have you become familiar with and are you able to express an opinion as to the reasonable value of professional services of an eminent surgeon in performing an operation in the city of Tucson, based upon the following considerations: Your knowledge of what constitutes the reasonable value of professional services of a physician and surgeon; your knowledge of the elements entering into the determination of a reasonable value of such services; your knowledge in general of fees for such services in Tucson, Arizona, and in other cities in the United States; the background, schooling, training and experience of the surgeon and any particular qualification he may have to perform such specialized operation; the time such surgeon was required to be absent from his office and practice; the distance travelled; the age and condition of the patient; the nature, character and extent of such operation; the knowledge and skill required to perform such operation; the facts and circumstances tending to indicate whether or not the operation was successful, and whether the patient would be expected to recover; the financial condition of the patient or the person responsible for the payment

(Testimony of William D. Carrell.)

of such fee—Can you express an opinion as to the reasonable value of performing such services, keeping in mind [414] those considerations?

Mr. Allen: I object on the ground that it is immaterial and incompetent due to the fact that an affirmative answer thereto could not show that this witness was qualified as an expert to express any opinion as to the value of the services in the instant case.

The Court: This question is propounded to the doctor here, if he is in a position to express an opinion—that is the preliminary question?

Mr. Robertson: That is right.

The Court: And you want your objection in the record at this time?

Mr. Allen: Yes, your Honor, on the basis it is immaterial, because an affirmative answer would not show qualification on the part of this witness to express an opinion as to the value of such services.

The Court: I am going to treat this hypothetical question as I indicated Saturday, that is, I will let the question be answered in this case, and the hypothetical question, [415] with the ruling reserved after I have heard counsel, either by brief or oral argument. I think I should treat these interrogatories, though the questions are propounded here in open court—that I should give them the same consideration as I will the interrogatories that have come in in the New York depositions.

Mr. Allen: Then I shall not—

(Testimony of William D. Carrell.)

The Court: Simply get the questions and the answers in the record, and then I shall hear counsel. There may be totally different objections coming in on questions, the hypothetical questions propounded by the plaintiff and likewise by the defendant.

Mr. Allen: May I ask the court a question? May counsel, in approaching that ultimate decision of the court, state the extent of objections at that time, as well as the authorities in support of them?

The Court: State the objections succinctly and then give your authorities. I do not want to take the time at this time to do the research work and determine the questions. I do not think it is necessary at this time when the depositions are in here. I do not know that under the new [416] rules it is necessary to even note an exception, but save it, to protect your record.

Mr. Allen: I want to include within the objection the ground that the foundational question is incompetent and irrelevant for the reason that it neither contemplates or includes any showing on the part of this witness of knowledge as to the fees charged within New York for similar services, and upon the further ground that it does not contemplate or include any showing of qualifications on the part of this witness as to having any experience or knowledge concerning the particular type of service rendered.

(Testimony of William D. Carrell.)

Mr. Robertson:

Q. Do you remember the question?

A. Yes, sir.

Q. Are you able to express an opinion?

A. I am.

Q. Are you acquainted, doctor, with the fees customarily charged by local surgeons and physicians——

Mr. Allen: Object to that as incompetent and irrelevant and having no bearing on the issues in this case.

The Court: Go ahead with the question. [417]

Mr. Robertson:

——in a general manner, doctor?

A. Yes, sir.

Q. Are you acquainted in a general manner with fees that have been charged by eminent specialists who have come to Tucson from other parts of the country, and with the nature of the operations that they performed and the financial condition of the patients to pay the fees? A. I am.

Q. Now, doctor, assuming that Dr. Donovan is one of the eminent baby specialists practicing in New York City, and has attained some national recognition in such field or specialty; and assume that he came to Tucson, leaving New York on the first day of April, 1939, arriving here on Sunday morning, having travelled by plane; and then, based upon your knowledge of the consultations that were held, the operation which you witnessed, the condi-

(Testimony of William D. Carrell.)

tion of the baby which you observed, the condition of the baby after the operation; and assume that while he was in Tucson, leaving here on Monday morning, the third of April, 1939, he checked the charts and examined the patient on one or more occasions; assume that he then left by plane for New York, arrived back in New York during the afternoon of Tuesday, the fourth of April, 1939; and assume that thereafter, on several occasions, he communicated with Dr. Thompson, either by telephone, telegram or letter, in connection with the condition, post-operative [418] condition of the patient; and assume that prior to his departure from New York, he was informed by Dr. Hugh Thompson, one of the doctors in attendance on the baby, that expense was no item; and assume that on his arrival in Tucson, no negotiations were carried on with the parents of the baby, who are the defendants in this case, and no agreement was reached as to the amount of the fee to be charged by Dr. Donovan for his services; and assume that at the time of the operation, Mr. and Mrs. Jeffcott were the owners of a ranch in Southern Arizona, which had a gross value of approximately \$150,000, subject to an indebtedness in the amount of \$75,000, approximately \$75,000; and assume that during the year 1939, the operation expenses of the ranch amounted to some \$11,000, and the gross income from the operation of the ranch was some \$8,000, but that the ranch at that time was simply in its

(Testimony of William D. Carrell.)

formative state; and assume that from its operation in subsequent years, it now appears that commencing with the years 1942 or 1943, the ranch will produce a net income or profit of between \$5,000 and \$8,000; and assume that Mr. Jeffcott at that time had no other employment or source of income of any consequence; and assume, doctor, that the baby survived the operation, and, except for the development of fecal fistula, which lasted approximately eight or nine months subsequent to the operation, and a hernia which developed and which will require an [419] operation in the future, that the baby's recovery has been uneventful; and based upon those facts which you know, and the facts which you are assuming that have been covered by the question, do you have an opinion, doctor, as to the reasonable value of the professional services rendered by Dr. Donovan in connection with the operation upon the baby and the post-operative attention given the baby?

Mr. Allen: I object to the question as to whether he has an opinion on the ground that such an opinion could not be material.

The Court: All right. Very well. The witness may answer.

A. I do have such opinion.

Mr. Allen: I object to the opinion of this physician on the basis that no qualification has been shown, and on the further basis that the hypothetical question assumes questions of fact not appearing in the evidence in the case.

(Testimony of William D. Carrell.)

The Court: You may amplify that. You may answer the question, doctor.

A. I have such opinion.

Mr. Robertson:

Q. What is your opinion of a reasonable fee to be paid to [420] Dr. Donovan?

Mr. Allen: Same objection.

The Court: Same ruling.

A. I think that a fee, not including expenses, of two thousand dollars is sufficient.

Mr. Robertson:

Q. In your practice, doctor, have you given consideration to the ability of a patient to pay?

A. Always.

Q. In what way do you consider the patient's financial circumstances when you are estimating a fee?

A. You mean for a surgical operation?

Mr. Allen: I object to that as immaterial, wholly immaterial. What this witness does in determining his own fees is not binding on anyone else.

The Court: I think the objection is good. I think the witness probably could show what the practice or custom is among practitioners in cases of this kind, but as to what his special practice is, I do not believe it is material. [421]

Mr. Robertson:

I withdraw the question.

Q. Do you know of any particular custom or consideration that is given to the financial ability of the patient to pay? A. Yes, sir.

(Testimony of William D. Carrell.)

Q. Will you state that.

A. For a major operation, it is a very widely practiced custom, not only in Tucson but in many other places, to charge what is roughly from one-tenth of the annual income to one month's income.

Q. And in the expression of your opinion that a fee of \$2,000 would be reasonable compensation to Dr. Donovan, did you take into consideration his professional standing?

A. Yes, sir.

Q. Did you take into consideration the distance that he travelled by airplane?

A. Yes, sir.

Q. The time he was required to be away from his office?

A. Yes, sir.

Q. The surgical skill which you saw him demonstrate?

A. Yes, sir.

Q. And did you also take into consideration the facts relating to the financial condition of Mr. Jeffcott, as I have related them to you?

A. Yes, sir. [422]

Q. Do you know of other instances, doctor, where surgeons who had a national recognition in some specialized branch of surgery which would be comparable to that of Dr. Donovan, have come to Tucson and performed operations?

A. Yes, sir.

Q. Did you know anything concerning the financial condition of the patients upon whom the operations were to be performed?

A. Yes, sir.

Q. Do you know of any such operations performed?

A. Yes, sir.

(Testimony of William D. Carrell.)

Mr. Allen: Same objection, addressed to the whole line of questions—calling for specific instances in an attempt to prove a generality by specific instances. It is not proper evidence. It is immaterial what any other surgeon may have charged in any given case.

Mr. Robertson: I think the scope of my questions has shown them to be comparable, and I intend to point out distinctions.

(No ruling. No answer.)

Q. Do you know of any case, doctor, despite the fact that some of the patients may have had unlimited financial resources and despite the fact the operation was of equal gravity, or more so, than the one performed in [423] this case, where a fee of even half the amount of the fee charged by Dr. Donovan was charged? A. I do not.

Mr. Allen: I object to the question and move the answer be stricken. It is wholly immaterial what he might know in that respect. It is a highly improper question, argumentative.

The Court: Objection sustained. The answer will be stricken from the record.

Mr. Robertson:

Q. You do know, do you not, the amount of the charge Dr. Donovan made in this case?

A. I do.

Q. Now, I repeat the question: Do you know of any circumstance, any instance, where any surgeon of equal prominence as Dr. Donovan, has performed an operation in this city, of equal gravity,

(Testimony of William D. Carrell.)

where they have come from a point without the state into the state of Arizona, where the patients had unlimited resources, where a fee of even half the amount of this fee has been charged?

Mr. Allen: Same objection.

The Court: Objection sustained. [424]

Mr. Robertson: I don't know to what extent we must make an offer of proof.

The Court: Do you have that proof?

Mr. Robertson: We propose to prove by the answer of Dr. Carrell, had the objection not been sustained, that other operations of equal severity or gravity have been performed by other doctors of equal professional skill and ability to Dr. Donovan, upon patients having equal or much greater financial ability to pay, and that the maximum fee of the several known by Dr. Carrell was the sum of five thousand dollars, and that in each of those cases the doctors came from points without the state of Arizona.

The Court: That is the line of examination that your objection runs to?

Mr. Allen: Yes.

The Court: It is in the record that the objection is sustained.

Mr. Robertson:

Q. Dr. Carrell, at the conclusion of the operation who was [425] it that reported the condition of the patient, or the success of the operation, to the parents? A. I did.

(Testimony of William D. Carrell.)

Q. And did you have any discussion with Dr. Donovan while he was out here relating to the fee that he might charge or hope to get paid?

A. Not as to figures.

Q. And I will ask you first if such a discussion was carried on on your own hook, so to speak, or whether Mr. Jeffcott had made any request that you negotiate for him?

Mr. Allen: I object to that question as immaterial, and calling for hearsay.

The Reporter: (Reading)

Q. And I will ask you first if such a discussion was carried on on your own hook, so to speak, or whether Mr. Jeffcott had made any request that you negotiate for him?

Mr. Allen: I make the further objection that it is a leading question.

Mr. Robertson:

I withdraw the question and shall reframe it.

Q. How did such a discussion happen to take place?

A. Dr. Donovan asked me about the financial circumstances of Mr. Jeffcott.

Q. What did you say? [426]

Mr. Allen: No objection.

A. I told him that Mr. Jeffcott, Mr. David C. Jeffcott, was a man of very moderate means, but that his father did have considerable money.

Mr. Robertson:

Q. And you told him that while he was out here?

(Testimony of William D. Carrell.)

A. I told him that when we were leaving the Desert Sanatorium the day the baby was operated on.

Q. Did you know whether or not Mr. Jeffcott's father had, by writing or otherwise, guaranteed the payment of any fee that might be charged for the operation?

Mr. Allen: I object to that as immaterial.

The Court: The objection is good.

Mr. Robertson: You may cross-examine.

Cross Examination

By Mr. Allen:

Q. Dr. Carrell, do you devote your practice exclusively to surgery?

A. I think I have testified that I devote my practice to obstetrics and gynecology. [427]

Q. Primarily to obstetrics, is that not true?

A. That is not true.

Q. Have you ever performed an operation for the correction of complete obstruction due to congenital volvulus, as you described this Jeffcott operation?

A. I have not.

Q. Have you ever seen one other than the one performed by Dr. Donovan upon the Jeffcott baby?

A. Not exactly like it.

Q. Has one ever been performed in Tucson by any eminent specialist within your knowledge?

A. With the exact pathology, I know of no other.

Q. Have you ever performed an operation on an eight-day-old baby of that gravity, Dr. Carrell?

(Testimony of William D. Carrell.)

A. No, sir.

Q. Have you ever performed any operation upon an eight-day-old baby? A. Yes, sir.

Q. Beyond the gravity of circumcision?

A. Yes, sir.

Q. You have changed your mind about the reasonableness of Dr. Donovan's fee since August, 1939, have you not? A. I have not.

Q. I will ask you to state whether or not you had a conversation with Dr. Hugh Thompson at your home, he coming there to discuss the matter with you, in which Dr. Donovan's fee or charge was the subject of the conversation, [428] such conversation taking place approximately during August, 1939.

A. I had a discussion with Dr. Thompson.

Q. I will ask you to state whether or not it is true that he came to you and asked you if you knew why Dr. Donovan's bill had not been paid.

A. That is right.

Q. I will ask you to state whether or not, in the course of that conversation, you did not state to Dr. Hugh C. Thompson that in your opinion if the charge had been between five thousand and seventy-five hundred dollars that it would have been regarded reasonable by you and that it would have long since been paid.

A. I made no such statement.

Q. And you were of the opinion at such time that two thousand dollars constituted a reasonable fee? A. Plus expenses.

(Testimony of William D. Carrell.)

Q. Now, doctor, do you make a practice of—I withdraw the question. You know it to be a fact, do you not, Dr. Carrell, that among surgeons of higher standing and reputation, regardless of where they may practice, it is not considered proper by other members of the profession of like standing for them to require the payment of a fee in advance of the performance of the service, or to require a commitment in advance of the performance of the service?

A. I do not understand who is requiring this. You bring [429] in surgeons and other surgeons. I do not understand the question.

Q. Do you know whether it is a practice among reputable surgeons to require their fee to be paid in advance of performance of the service, or not?

A. In some cases it is. I have done so, and I consider myself reputable.

Q. Regardless whether it is done in some cases or not, and not questioning your reputability, I again ask you whether or not that is a practice among surgeons of higher standing.

A. I know of one eminent surgeon who gets all of his fees in advance.

Q. And you know how that practice is looked upon by members of the profession, do you not?

A. It is not looked down on at all. It is a business proposition.

Q. It is done where a surgeon wants to make all out of an operation he can?

(Testimony of William D. Carrell.)

A. That is not right. That man's fees are very conservative, but they are paid.

Q. And it is true, is it not, Dr. Carrell, that among surgeons of reputable standing, where a substantial fee is required in advance of an operation, it is regarded as a commercial attitude on his part, is it not?

A. May I have the question read? [430]

The Reporter: (Reading)

Q. And it is true, is it not, Dr. Carrell, that among surgeons of reputable standing, where a substantial fee is required in advance of an operation, it is regarded as a commercial attitude on his part, is it not?

A. Would you please qualify what you mean by "commercial"?

Mr. Allen:

Q. You represent, do you, that you cannot answer the question intelligently?

A. I can answer your question intelligently, but I do not understand what you mean. There is a great difference between "commercial", which is purely business, and "mercenary", which is not business.

Q. Let us call it "mercenary".

A. I do not consider that mercenary.

Q. You do not? A. No.

Q. And that is the custom on which you arrange for the payment of your fees, is it, doctor?

A. What is the question?

(Testimony of William D. Carrell.)

The Reporter: (Reading)

Q. And that is the custom on which you arrange for the payment of your fees, is it doctor?

A. Part of my fees are paid in advance one hundred per cent; part nothing paid on them; on part of them a part-payment is made in advance. [431]

Mr. Allen:

Q. Do you have any knowledge, Dr. Carrell, as to what the practice and custom is among eminent surgeons, eminent pediatric surgeons, of New York City, or its metropolitan area, as to the amount they charge for operations such as was performed upon the Jeffcott baby?

A. I did not know there were any such eminent surgeons.

Q. They you do not have any such knowledge?

A. No, I do not.

Re-direct Examination

By Mr. Robertson:

Q. What was this conversation you had with Dr. Thompson?

A. Dr. Thompson came to see me to see what he could do about settling the bill. Evidently, from what he told me, he came at Dr. Donovan's request.

Q. All right, what was that discussion?

A. I do not recollect all of it. That is impossible.

Q. I mean as nearly as you can recall, doctor. Give us the substance of that conversation.

(Testimony of William D. Carrell.)

A. We discussed what we thought about the fee, particularly what I thought about it, and I stated flatly that it was an exorbitant, ridiculous and purely fantastic fee.

Q. All right. What was Dr. Thompson's attitude? A. I did not ask him.

Q. Did he state whether or not he thought twelve thousand dollars was a reasonable fee in this case? A. He did not. [432]

Q. And did you make any such statement as Mr. Allen asked you about a few moments ago?

A. I did not.

Q. Now, doctor, what operations have you performed upon infant children of equal or comparative gravity to the one performed by Dr. Donovan on the Jeffcott baby?

A. By infant children what age do you mean?

Q. Oh, any children in the first few weeks or months of their lives.

A. I have done one operation on a child between three and four months of age, with a very extensive intussusception, which was of severity.

The Court: A little louder.

A. I have done one operation on a child between three and four months of age for intussusception, which is an obstruction, not congenital, but acquired after birth.

Mr. Robertson:

Q. Is that operation of equal or similar gravity to the operation performed in this case?

(Testimony of William D. Carrell.)

A. Yes, sir. In fact, it was a very late case, in which the intussusception had been there for quite a while. The child was in very bad shape, in fact, was moribund at the time of the operation, and died following the operation.

Q. What other operation of a like nature have you performed? [433]

A. I have had very little infant surgery, young infants. I had one born with congenital hernia down in the umbilical cord, which I operated on on the obstetric table, successfully.

Q. What operations have you performed on larger, older patients?

Mr. Allen: I object to that, not proper cross-examination.

Mr. Robertson: Mr. Allen would like to limit my cross to what he wants to get out of Dr. Carrell. Now, your Honor knows there is more than one branch of a specialized nature, and there are operations on adults of equal or greater gravity than the one Dr. Donovan performed upon the Jeffcott baby. I asked Dr. Carrell about his qualifications to judge the skill of the operation.

The Court: As to the qualifications of the witness?

Mr. Robertson: In connection with the line of cross-examination carried on by Mr. Allen.

Mr. Allen: In spite of the new rules, I think the courts still follow the theory that when a counsel makes an individual his witness, he examines him

(Testimony of William D. Carrell.)

on direct, and the cross- [434] examination is conducted. This is re-direct.

The Court: The objection is sustained, Mr. Robertson. I am sustaining the objection on the ground that you are limited now as to the line of examination.

Mr. Robertson:

Q. What operations of a similar nature have you seen or participated in, Dr. Carrell?

A. I have helped many other surgeons operate on babies with obstruction of the bowels.

Q. Were any of those surgeons eminent New York surgeons?

A. I never assisted a New York surgeon.

Q. Are there any eminent surgeons who live in the United States and do not live in New York City?

A. Yes, sir.

Q. Have you helped any of those?

A. Yes, sir.

Q. Who are they?

A. One man is Nelson Mortimer Percy, of Chicago.

Q. Is he considered pretty fair?

A. I consider him the best operator I ever saw work.

Q. All right. Who else?

Mr. Allen: Same objection, your Honor. It is improper examination at this time. It might have been pertinent on the direct examination of the witness. [435]

(Testimony of William D. Carrell.)

The Court: Yes, I think so, Mr. Robertson.

Mr. Robertson: Mr. Allen asked if it was not the first time he had ever seen any operation of this gravity. I would like to have Dr. Carrell tell your Honor——

Mr. Allen: I asked Dr. Carrell if he had ever seen mal-rotation of the intestines as a result of congenital volvulus.

The Court: If you want to limit your question to that——

Mr. Robertson: I do not think it is of much consequence, so I withdraw the question.

Mr. Allen: That is the reason I objected. I do not think it is of any consequence.

Mr. Robertson: That is all. May I have Dr. Carrell excused?

The Court: Very well. If the counsel do not require him here, he may be excused.

Mr. Robertson: Call Dr. Gore. [436]

VICTOR M. GORE

called as a witness herein on behalf of the defendants, having been first duly sworn, according to law, was examined and cross-examined and testified as follows:

Direct Examination

By Mr. Robertson:

Q. Will you state your name, please?

A. Victor M. Gore.

(Testimony of Victor M. Gore.)

Q. Where do you reside?

A. Tucson, Arizona.

Q. What is your profession?

A. The practice of surgery.

Q. How long have you been engaged in that practice, doctor?

A. Since 1923.

Q. Will you give us your educational background in connection with the study of your profession?

A. I graduated from a little college in Illinois; took my medical training at Washington University at St. Louis; served internship in the city hospital there.

The Court: What was the college from which you graduated?

A. Lackford College, a little literary college.

Mr. Robertson:

Q. When did you graduate?

A. From college in 1904 and in medicine in 1908. [437]

Q. Did you belong to any honorary or scholastic society?

A. I belonged to a medical fraternity called the Phi Deltas.

Q. And where did you start your practice?

A. In Oklahoma.

Q. How long did you practice there?

A. Until 1923.

Q. From what date?

A. From 1910 to 1923.

(Testimony of Victor M. Gore.)

Q. And then you came to Arizona?

A. Yes, sir.

Q. How long have you specialized in surgery?

A. Since 1918.

Q. And all of the time that you have been in Arizona, you have specialized in surgery?

A. Yes, sir.

Q. What organizations do you belong to?

A. To the state, county and AMA medical societies. I have been a member of the College of Surgeons since 1921; certified by the American Board of Surgery in 1938.

Q. Are those organizations considered honorary in the profession? A. Yes, sir.

Q. And what distinction do you hold at the present time in connection with surgery?

A. I do not know whether I get what you mean, unless it would be that I am the only general surgeon certified by the Board in the state of Arizona at the present time. [438]

Q. That is what I meant, doctor.

A. There is one other, but he is not in the state now, Dr. Greer, of Phoenix.

Q. Have you become acquainted with the customs and manner of fixing fees for surgical operations?

Mr. Allen: Just a moment. I wish to interpose a record objection to the question, as being incompetent and immaterial, and too broad in its scope.

The Court: What is that?

(Testimony of Victor M. Gore.)

Mr. Allen: I wish to object to that question as having no propriety in that it is too broad in its scope to appear from it whether it has any materiality as to any issues in this case.

The Court: You object to the question because it does not limit the situation to the one presented by this cause?

Mr. Allen: Neither primarily or situationally.

Mr. Robertson: He objected a while ago because I was too narrow, and now because I am not narrow enough.

The Court: The witness may answer. [439]

The Reporter: (Reading)

Q. Have you become acquainted with the customs and manner of fixing fees for surgical operations?

Mr. Robertson:

Q. —by surgeons who are practicing in this vicinity or over the country at large?

A. I would say yes.

Q. And what are the considerations that enter into the fixing of a professional fee for surgery?

A. As far as I know, my practice and the general practice is to fix a fee commensurate with the ability of the patient to pay.

Q. The ability of the patient to pay is one element that is considered by you in fixing the fee, and it is the custom that prevails?

A. Yes, sir, it is the largest element as far as I am concerned always.

(Testimony of Victor M. Gore.)

Q. And what other considerations enter into it?

A. The type of the operation, the time consumed, the aftercare required, the skill of the individual operator, all would probably have some bearing, but in the final analysis irrespective of what operation it is, it must stand or fall upon the ability of the patient to pay. Every man doing surgery probably does half his surgery without compensation at all, and what would be a fair fee for one person might be an impossible fee for another. You [440] cannot do it like you buy a bale of hay or a sack of sugar, but what is usually the case, as far as I know, and from common knowledge, is ten per cent of a person's income.

Mr. Allen: I object to the dissertation on the part of the witness and move the latter part of his answer be stricken.

Mr. Robertson:

Q. I will ask you in what way, then, doctor, do you consider the financial condition of the party in fixing the fee?

A. The income of the patient.

Q. And for a major surgical operation, what is the customary practice, if you know?

Mr. Allen: If your Honor please, I object to the question as calling for the opinion of one witness as to his own practice in that respect, and not throwing any light whatever upon the issues before the court, and not based upon any foundation.

(Testimony of Victor M. Gore.)

The Court: The witness may testify as to the practice, if he knows.

Mr. Robertson: He said the general, widely accepted.

The Court:

Q. Was that your testimony, doctor? [441]

A. Yes.

Mr. Robertson:

Q. Will you go ahead, please, and state in what way you consider a patient's income as an element in fixing a fee for an operation.

A. Ten per cent of the patient's income is considered a fair fee for major surgical procedures.

Q. That is, the patient's annual income?

A. Yes, sir.

Q. In a case, doctor, where an outstanding surgeon, such as Dr. Donovan, comes into the state of Arizona and performs an operation, are there any other additional elements you take into consideration? A. Yes, sir.

Q. Will you name them, please?

A. Where a man has made a long trip away from home, he certainly should be compensated further than if he lived at the place where the operation is done.

Q. Do you feel qualified, doctor, to express an opinion as to the reasonable value of professional services of an eminent surgeon performing an operation in the city of Tucson, giving consideration to the various elements you have already testified to?

(Testimony of Victor M. Gore.)

A. Yes, sir.

Q. Doctor, you know Dr. Donovan?

A. I met him once, the day of the operation.

Q. That is the operation on the Jeffcott baby?

[442]

A. Yes, sir.

Q. And were you acquainted with the condition of the patient prior to the operation?

A. I had never seen the patient prior to the operation.

Q. In the course of your discussion of the matter with Dr. Donovan, were you made acquainted with his condition prior to the operation, and what the operation was for?

A. In a general way, yes. I was introduced to Dr. Donovan the day of the operation. He very kindly invited me to be present, and in the discussion with Dr. Thompson and Dr. Carrell and Dr. Donovan, I was informed that this was a congenital obstructive lesion.

Q. Did you have occasion to observe the manner in which the operation was performed by Dr. Donovan?

A. Yes, sir.

Q. And what he did in the course of the operation?

A. Yes, sir.

Q. Do you know the outcome of the operation, as to whether or not it was successful?

A. It was.

Q. Doctor, based upon your knowledge of the condition of the patient, the nature, extent and the

(Testimony of Victor M. Gore.)

manner in which the operation was performed by Dr. Donovan; the condition of the patient after the operation, as to whether or not he survived; and assuming that Dr. Donovan is one of the most eminent baby surgery specialists in the City of New York, and that at the request of Mr. Jeffcott, he left [443] New York on Saturday night, April first, and came to Tucson, arriving here Sunday morning, coming by plane; that he examined the charts and consulted with the attending physicians; performed the operation, stayed here until Monday morning, until eleven o'clock, leaving by plane, and returned to New York, and arriving in New York City Tuesday afternoon; and assume that there was no definite agreement reached between Dr. Donovan and Mr. Jeffcott as to the amount of compensation; and assume that at the time of the operation, or during that year, Mr. Jeffcott was engaged in the development of a ranch lying near Patagonia, Arizona, and that the market value of the ranch was, roughly, \$150,000, subject to an indebtedness of, roughly, \$75,000; that the operation expenses of the ranch for that year exceeded the ranch income by some \$3,000, but that was in part due to the fact that Mr. Jeffcott had the ranch in the formative stage, and was unable to sell and dispose of any cattle so that he could offset the expenses with any income; assume that operations since that time have resulted to where he can now anticipate an annual income of between five and eight thousand dollars, the mar-

(Testimony of Victor M. Gore.)

ket value of the ranch having been increased now, at the present time, to \$199,000, with an indebtedness of \$128,000 against the property; and also assume that upon Dr. Donovan's return to New York that, on several occasions he communicated with and exchanged ideas and suggestions with Dr. [444] Thompson, who was in charge of the patient, with your assistance—I will ask you to state, doctor, as to whether or not you have any opinion as to a reasonable fee to be charged by Dr. Donovan for the services performed.

Mr. Allen: Same objection, your Honor, to this foundation question. It is an immaterial question in that if answered in the affirmative, it would not show that this witness is qualified to answer the question; furthermore, that the hypothetical part of the question assumes matters not in evidence in the case.

The Court: You may answer the question, Doctor.

A. Yes, sir.

Mr. Robertson:

Q. Will you state what, in your opinion, constituted a reasonable fee for his services?

Mr. Allen: Same objection.

The Court: Same ruling. Answer the question.

A. I think that, taking into consideration the fact that he [445] had made the trip from New York out here, that he should certainly be paid

(Testimony of Victor M. Gore.)

twice as much as a doctor here should have charged for the same services. In addition to that, I think his complete expenses should have been paid. I should say that, in my opinion, a fair fee would be somewhere between fifteen hundred and two thousand dollars, and his expenses.

Mr. Robertson:

Q. Now, doctor, you attended the baby after the operation, did you not?

A. I saw him three or four times, with Dr. Thompson, after the operation.

Q. Have you ever performed an operation similar to the one that was performed upon this infant?

A. I have never even seen a case like this. I have seen many cases of volvulus in older children, but this was the first case of this kind I have ever seen.

Q. Have you ever seen or performed any operations for similar conditions?

A. For obstructions, yes. I have had a number of cases of partrisa of the pylorus at the end of the stomach, and in older children I have had many cases of intussusception and a number of cases of volvulus.

Q. From a standpoint of the gravity of the operation or condition of the patient, from the surgeon's standpoint, would you say they compare with the gravity of the condition of the Jeffcott baby?

(Testimony of Victor M. Gore.)

A. Practically alike in the fact that if the condition is not relieved, the condition is not compatible with life.

The Court: I did not get that answer.

A. Unless the condition such as existed with this baby, of complete obstruction of the bowel, is relieved, the child will perish.

Mr. Robertson:

Q. From the standpoint of the operator, is a condition of that kind more difficult to relieve than a condition of intussusception?

A. Intussusception may be a very minor thing. If the bowel is not open and a resection is not required, it is rather a simple thing, and would simply require a reduction of it. The thing that makes for gravity is the amount of work that has to be done.

Q. Have you performed operations of equal gravity? A. Yes, sir.

Q. I do not suppose you could give us any estimate of how many major surgical operations you have performed, doctor?

A. Well, a good many. I don't have the number. I have been continuously at it for more than twenty years now.

Q. Do you keep any records?

A. I do not keep a record as to number. The records are all available. [447]

Q. You are more interested in your work than the number of operations you perform?

(Testimony of Victor M. Gore.)

A. I never had any special interest in the number.

Mr. Allen: I object to this facetious examination. I will stipulate that he is more interested in his surgical work than in his numerical records.

Mr. Robertson: Thank you. You may cross-examine.

Cross Examination

By Mr. Allen:

Q. Dr. Gore, are you personally engaged in the practice of your profession, limiting it practically exclusively to surgery? A. Yes, sir.

Q. Have you ever operated upon a newborn infant in the eighth day of its life for a condition of the gravity and seriousness involved in the Jeffcott operation? A. Yes, sir.

Q. It is true, is it not, Dr. Gore, that it is more difficult to perform—Let us put it this way: That the younger the infant, the more difficult it is to perform the operation upon the infant?

A. That is very true, yes, sir.

Q. And the younger the infant the shorter the time during [448] which that patient will sustain its resistance in the course of an operation?

A. The time element is certainly a factor, if that is the point you are making.

Q. The older the infant, the longer his resistance will be sustained?

A. Certainly the older the infant, the more resistance he has. Are you trying to get at the length of time consumed in the operation?

(Testimony of Victor M. Gore.)

Q. I will ask you a further question, Dr. Gore. It is true, is it not, so far as your knowledge extends on the subject, that a new-born infant will continue to resist through an operation up to a certain point and then very rapidly and suddenly abandon all resistance?

A. I am sorry, I do not get what you mean.

Q. You would not feel as constrained to haste in the completion of an operation in a six-months-old child as a six-day-old child? A. No.

Q. The time element would certainly be the great factor, would it not?

A. Yes, sir.

Q. I believe you testified that never in the course of your surgical practice had you even witnessed an operation on all-fours or closely similar to the one performed on the Jeffcott baby?

A. No, not with this particular type of lesion, where it was [449] a congenital volvulus, involving the twisting of the small bowel. I think they are pretty rare.

Q. Have you ever practiced your profession in New York City? A. No, sir.

Q. You are not familiar with the practice and custom of the more eminent surgeons of that locality as to their charges, are you?

A. Only from what others have told me.

Q. But you do not know of your own knowledge what the custom is, the custom and practice is, in the city of New York?

(Testimony of Victor M. Gore.)

Mr. Robertson: I object to the question, because the doctor has stated that is all he knows, what the other doctors have told him. That is all any doctor can know, is what they have found out by hearsay. In fact, that is all Dr. Donovan knows, is what someone else told him. It must be based upon a common knowledge or common custom. The entire evidence is either objectionable or you are going to have a lot in the evidence about the custom and practice of other doctors.

The Court: Answer the question.

A. Only what men practicing there have told me.

Mr. Allen:

Q. Now, Dr. Gore, you testified, I believe, that it is your [450] practice to ascertain a patient's income and then charge him for a major surgical operation ten per cent of his annual income?

A. That is true.

Q. Now, Dr. Gore, assuming a case in which you might be called upon to perform a major surgical operation, and in the course thereof, you may be called upon to travel a great distance from your city of practice, the place in which you conduct your practice; assuming that you were called there by virtue of your reputation in the performance of the operation needed, your past experience; and assuming that you performed an operation of gravity and seriousness on a par with the operation performed upon the Jeffcott baby, and that the par-

(Testimony of Victor M. Gore.)

ents in that instance claim to have no income, but they represent to you that they have substantial worth, and they represent to you further that the father of one of those parents is a man of substantial wealth, and they indicate to you that they are in a business, conducting a business which involves the ownership of property of substantial value, do you mean to say that you would not regard that you were entitled to charge any fee for your services, because, at the moment, those parents had no income?

Mr. Robertson: I object to the portion of the question which relates to the financial condition of the parents, because it could have no possible bearing upon the fee the doctor [451] could charge, if he were trying to do it in a fair and reasonable way, unless there was some legal obligation upon the part of the grandparents to pay for the operation.

Mr. Allen:

Q. I wish to amend that question. I omitted to state in regard to that question, Dr. Gore, that if you understood further, and were correctly advised, that this father of the parent had made gifts to the parent which had permitted him to set up this business of substantial value, and if it further appeared that such grandparent of substantial wealth had for a period of years paid the operating expenses, or advanced the operating expenses, of the parent of the infant patient, would you then,

(Testimony of Victor M. Gore.)

and under all of those circumstances, assume that because of the lack of income of said parent of the infant patient, you were not entitled to charge for your services? A. Certainly not.

Mr. Robertson: I renew my objection to the grandparent and any financial responsibility of the grandparent to pay for the operation.

The Court: The question has been answered. The ruling may be reserved.

Mr. Allen:

Q. Now, Dr. Gore, let us assume a little further in this [452] matter. Assume that you were an eminent surgeon, that is, a surgeon of eminent standing in the field of experience and qualifications for the performance of a specialized operation——

A. Tell me what you mean by that. What constitutes an eminent surgeon?

Q. I withdraw that portion of the question. Assume, Dr. Gore, that you had had a very broad background of experience in the field of performing the operation which was performed on the Jeffcott baby——

A. That would be an impossible thing to do because the condition is so rare that no man could have a broad background in that field.

Q. Let us assume that you had performed fourteen of those operations, and that you, in association with another pediatric surgeon, had reported upon the performance of twenty operations of that

(Testimony of Victor M. Gore.)

sort, and that these reports had been publicized and were matters of knowledge among pediatricians in the country, and that you had had a long period of training which particularly qualified you to perform that operation, and you had had an opportunity to perform it fourteen times. That is understandable to you, is it not?

A. Perfectly.

Q. Let us assume that at some point two thousand miles distant from your place of practice your background in that [453] respect was known to pediatric surgeons or pediatricians, and, as a result thereof, you were suggested to be called to that community to perform that particular operation; and let us assume that the parents of the infant involved in this situation, when your name was suggested, directed the pediatrician in charge of that infant to communicate with you and determine whether or not you would perform that operation here in Tucson. Let us assume further that that pediatrician in the other community made contact with you and made an appointment with you, under which arrangement you were to see this baby here in Tucson, as soon as they could bring it to you, and you were to operate upon it, perform that particular operation, if needed. Let us assume that thereafter this pediatrician had a further conversation with the father of this child, and at that time the father of the child asked this pediatrician to again call Dr. Gore by long distance, and to arrange for

(Testimony of Victor M. Gore.)

him to come to Tucson, Arizona, at once. And let us further assume that in the course of that conversation between that father and that attending pediatrician the father had advised the pediatrician that money or expense were no item. Let us assume that that pediatrician then got in touch with you again and asked you if you would come to Tucson and perform the operation; and let us assume that you hesitated in making your response; and let us assume that at such point in such negotiations [454] this attending pediatrician advised you that the father of said infant had said that money and expense were no item. Now, I want to ask you, Dr. Gore, whether you would have felt, under those arrangements, that there was any duty upon you in the conduct of your professional activity to negotiate further with the parents of that child for the fee, before performing the operation.

A. Well, I think it would depend upon how well I knew the man who was talking to me, and if I expected to charge a large fee, I would certainly name the fee and ask who was going to pay it.

Q. In other words, if you were going to charge a large fee, you would want to know where the fee was coming from before you went out to perform the operation?

The Court: I did not get the answer.

A. I think it is a perfectly fair question to inquire who is to pay it, and the ability of the person to pay it.

(Testimony of Victor M. Gore.)

Mr. Allen:

Q. Then, based on the wealth of your experience, Dr. Gore, you want the court to understand here that it is your belief that, notwithstanding that Mr. Jeffcott, the defendant in this case, when advised of the condition of his child, when advised by attending physicians that it would be advisable to have his baby operated upon by [455] some surgeon outside of Tucson, when negotiating, giving instructions to the attending pediatrician for the employment of Dr. Donovan to come here and perform the operation, Dr. Donovan having been selected at the request of the attending pediatrician, advised Dr. Thompson that money was no object in getting Dr. Donovan to come here, and Dr. Donovan having come here to perform the operation, the father made no advances toward him, had no discussion with him concerning the fee at any time; that thereafter, after the operation had been successfully performed and the surgical condition had been properly corrected, upon receiving his bill indicating the amount of Dr. Donovan's charge, waited approximately twenty days and then wrote to Dr. Donovan and advised him that he was a poor man in that all he had was a hundred and fifty thousand dollar ranch, subject to a fifty thousand dollar mortgage; and that under those circumstances you believe that all that it was reasonable for Dr. Donovan to charge was between fifteen hundred and two thousand dollars?

(Testimony of Victor M. Gore.)

A. The reply to that question is based on income.

Q. Let us assume further that Mr. Jeffcott at such time advised the doctor that he had no income, but at the time was spending about twelve thousand dollars that year for the personal expenses of his family, do you still feel that under those circumstances the maximum reasonable fee the surgeon would be able to—that the [456] surgeon would be entitled to would be between fifteen hundred and two thousand dollars?

Mr. Robertson: Before this question is answered, I want to renew my objection upon the incorporation of the idea in the question that the grandfather of the child has any responsibility whatsoever for the payment of any fee.

Mr. Allen: The grandfather has not even been mentioned in this question.

The Court: I thought you were quoting from the letter.

Mr. Allen: From the letter, that during that year his family expenses were twelve thousand dollars.

The Court: Go ahead and answer the question, doctor.

The Witness: Will you read the question?

The Reporter: (Reading)

Q. Let us assume that Mr. Jeffcott at such time advised the doctor that he had no income, but at the time was spending about twelve thousand dol-

(Testimony of Victor M. Gore.)

lars that year for the personal expenses of his family, do you still feel, under [457] those circumstances, that the maximum reasonable fee the surgeon would be entitled to would be between fifteen hundred and two thousand dollars?

A. Yes, I think it would.

Mr. Allen: Take the witness.

Redirect Examination

By Mr. Robertson:

Q. And, doctor, in connection with the question Mr. Allen has just asked you, would the fact that over six thousand dollars out of the twelve thousand dollars referred to by Mr. Allen was for medical expenses in connection with the same baby you have operated upon, lead you to believe that fifteen hundred to two thousand dollars was a reasonable charge?

Mr. Allen: I object to that question, as the doctor has testified here it would not affect him in the least; therefore it would not make any difference as to what the twelve thousand dollars was spent for. He said that in spite of it, he still believed that was a reasonable fee. It does not make any difference to him, he said, what the money was spent for.

The Reporter: (Reading)

Q. And, doctor, in connection with the question Mr. Allen [458] has just asked you, would the fact that over six thousand dollars out of the twelve thousand dollars referred to by Mr. Allen was for

(Testimony of Victor M. Gore.)

medical expenses in connection with the same baby you have operated upon, lead you to believe that fifteen hundred to two thousand dollars was a reasonable charge?

Mr. Robertson:

Q. Answer the question.

A. I think it would.

Q. Now, doctor, have you been told by surgeons or doctors or physicians practicing in New York and vicinity and, for that matter, in other large cities all over the United States, as to their custom of taking into consideration the financial ability of the patient to pay? A. Yes, sir.

Q. Would you say that that is a generally well-recognized custom?

A. I think it is a very widely recognized one.

Q. Doctor, in connection with so-called specialists in any particular line of work, where perhaps they devote more of their time to doing one thing, and finally become very proficient in one particular line, would you say they are entitled to any very considerable amount of money more for any one operation than a surgeon who is called upon to devote his energies, his intellect and his ability to a considerable number or variety of types of operations? [459]

Mr. Allen: I object to the question as to its form, its comparative features. It is a question not susceptible to an accurate answer. I think there are

(Testimony of Victor M. Gore.)

other ways of getting at what is desired here, but I do not believe that is the way.

The Court: It is a question involving the qualifications of the surgeon?

Mr. Robertson: No, but where a man chops in the same groove every day, he is not entitled to any more for the time and skill he puts into a job than a general surgeon who performs many types of operations, when you are figuring what constitutes a reasonable fee for any particular service.

Mr. Allen: That is a highly argumentative form of question, your Honor.

The Court: Did you get the question?

The Witness: I think I know what he means but I am not sure I do.

Mr. Robertson:

Q. Will you answer, doctor?

A. You are asking for the custom or for my opinion?

Q. For your opinion. [460]

A. I think so.

Q. In other words, in computing his fee for services, you would take into consideration the same elements that you have taken into consideration in fixing any fee of a surgeon, whether he be general or special?

A. Yes, sir.

Mr. Robertson: That is all.

Re-cross Examination

By Mr. Allen:

Q. Do you know the custom of charges of a rec-

(Testimony of Victor M. Gore.)

ognized specialist in comparison to a general practitioner?

A. I know the custom of John Edmond Sinclair and Joseph Blake, of New York City, whom I think Dr. Donovan will admit are fairly reputable surgeons.

Q. You know their charges are higher than those of ordinary surgeons, do you not?

A. I do not know that their charges are any higher than in the west. In fact, I think they are higher in the west, but I am satisfied of this: That they are based upon the patient's ability to pay, and there is no hesitation in charging any kind of fee, if the patient is able to pay, but any one of them would operate on them for nothing.

Q. You think the ability of the patient to pay is particularly controlling? [461]

A. I think it is the only fair way to do it.

Q. From your viewpoint it practically controls the amount of fee that any surgeon should charge for any operation?

A. Yes, sir.

Q. That is what I want to get at. And it is your opinion that a person worth one hundred thousand dollars should not be called upon to pay a penny more, to ask one of those doctors to come here from New York because of his recognized skill and specialized training, than they should to hire any surgeon anywhere?

Mr. Robertson: I object to the form of the question.

(Testimony of Victor M. Gore.)

The Court: No, I think not.

Mr. Robertson: Very well.

A. I think I have already testified that he ought to be charged twice as much and his expenses.

Mr. Allen:

Q. That is merely because he went away from his practice, rather than that he had any skill?

A. That was based upon the skill, that he was away from home and making a long trip.

Q. In other words, under those circumstances, you would [462] take into account only the financial condition of the obligated party and the fact the surgeon was called upon to leave his field of practice?

A. I think he should be paid more than a local man and paid more than he would be paid for similar services performed in his home town.

Q. He should be paid more because he is called upon to leave his home and go elsewhere?

A. Absolutely.

Q. And you still maintain that no matter what a wealth of experience he had in performing the operation required by the patient, he should receive no greater fee?

A. In fixing the fees, no, sir, because they must be based entirely upon the patient's ability to pay them.

W. PAUL HOLBROOK

called as a witness herein on behalf of the defendants, having been first duly sworn, according to law, to testify to the truth, the whole truth and nothing but the truth, was examined and cross-examined and testified as follows:

Direct Examination

By Mr. Robertson:

Q. Will you state your name, please?

A. W. Paul Holbrook. [463]

Q. Where do you live, Dr. Holbrook?

A. Tucson, Arizona.

Q. What is your profession?

A. I am a physician.

Q. Are you specializing in any type or in any particular branch of your profession?

A. I am an internist and diagnostician.

Q. What has been your educational background?

A. How much do you want?

Q. Well, hit the high spots.

A. I graduated from the University of Washington as a chemical engineer, and from the University of Oregon as an M. D. I did post graduate work at Harvard for six months; post graduate work abroad for a year, and post graduate work each summer for approximately two or three months in various clinics of the country.

Q. How long have you been engaged in the practice of your profession?

A. Eighteen years, I believe.

(Testimony of W. Paul Holbrook.)

Q. Where have you practiced your profession?

A. In Portland, Oregon, San Francisco, and here for the last thirteen years.

Q. Since coming to Tucson have you been practicing by yourself or connected with some institution?

A. Both ways.

Q. Would you state what your connections have been?

A. I was physician in chief at the Desert Sanatorium for [464] six years and have since that time been in Tucson, in town, practicing with an assistant.

Q. And have you secured any honorary degrees, or do you belong to any associations having honorary significance?

A. I belong to the American College of Physicians and am certified by the American Board of Internal Medicine as a specialist. I belong to a lot of medical societies. You don't want those, do you?

Q. I think not, doctor. In the course of your practice, have you become sufficiently familiar with the branch of surgery to be able to express an opinion as to the reasonable value of the services of an eminent specialist in baby surgery, coming from New York to perform an operation in Tucson?

Mr. Allen: I shall again object to this type of foundational question on the ground that it is wholly immaterial. There has been no foundation laid for this particular question in that it is affirmatively assumed that this proposed doctor is not a surgeon,

(Testimony of W. Paul Holbrook.)

and on the grounds of my previous objection, that an affirmative answer could not tend to show any qualification of this witness to give any expert opinion on the fee charged in this case.

The Court: This is the same?

Mr. Allen: [465]

The Court: The witness may answer the question.

The Reporter: (Reading)

Q. In the course of your practice, have you become sufficiently familiar with the branch of surgery to be able to express an opinion as to the reasonable value of the services of an eminent specialist in baby surgery, coming from New York to perform an operation in Tucson?

A. I should like to answer the question by saying I have had many consultants——

Mr. Allen: I suggest, your Honor, that the witness be advised that the question calls for a “yes” or “no” answer.

The Court: It is a preliminary question.

A. All right. The answer is “yes”.

Mr. Robertson:

Q. From what source or sources, doctor, have you gained that information?

A. Well, I have been obliged on a number of occasions to call consultants from various other towns out of Tucson, and Tucson specialists as well. My internal medicine situation requires frequent surgical consultation.

(Testimony of W. Paul Holbrook.)

Q. Have you had occasion to consult with surgeons from New [466] York or in eastern cities?

A. Yes, sir. I have brought none of them to Tucson, but have consulted with them there. Is that what you mean?

Q. From these consultations, have you found their customs or the things they take into consideration when fixing the reasonable value of their surgical services?

A. Are you asking, Mr. Attorney, what they use as a guide to a fair fee ?

Q. Yes, doctor, I am asking you that question.

A. The usual guide to a fair fee by a consultant or any other physician is the patient's ability to pay, and the fee is set with the patient's circumstances in mind, and even for a major operation, sometimes they use ten per cent of the yearly income as a rough basis, although that is not always done.

Q. Do you know whether or not the surgeons of the city of New York and other large cities of the United States use that system in fixing fees?

A. I would not say that is universal, but it is used in the city of New York and elsewhere.

Q. I am talking about the general ability to pay and not the ten per cent?

A. The general ability to pay is always used.

Q. By the New York surgeons, as well as others?

A. That would be my judgment.

Q. I believe you have testified that you have had occasion to collaborate with and confer with leading surgeons from [467] all over the United States?

(Testimony of W. Paul Holbrook.)

A. That is true.

Q. May I ask whether you, in pursuit of your profession, ever make use of airplane travel?

Mr. Allen: I object to that as incompetent and irrelevant.

Mr. Robertson: We have a five thousand dollar item in the bill before the court because of the hazards of airplane travel, and I propose to show it is a very customary method of travel.

Mr. Allen: That is a matter for argument, whether or not there is any five thousand dollar item in here for airplane travel. However, it is immaterial as to how any physicians or surgeons travel to go anywhere. The sole question is whether this expert witness knows anything that can enlighten the court on the value of these services, and he certainly has not qualified as an expert on the reasonableness of the fee of an eminent specialist.

Mr. Robertson: I would not have called Dr. Holbrook here if I did not intend to ask him what is a reasonable fee for Dr. Donovan's services, but I am not limited in my direct. This is a question to lay the foundation for his opinion. [468]

The Court: If it is an element of the doctor's estimate of what the services are worth, an element to be taken into consideration in arriving at what is a reasonable fee, it is admissible. There has been some testimony of Dr. Donovan and others that he came to Tucson by airplane.

Mr. Robertson: Dr. Donovan testified that the trip by plane was worth five thousand dollars to

(Testimony of W. Paul Holbrook.)

him and figured in the estimation of the fee to that extent.

Mr. Allen: The mode of travel of Dr. Donovan is certainly competent, but the means by which this expert travels, or any other expert travels, throws no light upon this issue, and if this question is designed to develop the means by which this physician or any other physician travels to any point, it is immaterial.

The Court: Dr. Holbrook stated that he has had occasion to consult with several physicians from out of Tucson.

Mr. Robertson: Yes, sir, and as I recall some have come here by airplane.

The Witness: I don't think I made that statement. [469]

Mr. Robertson:

Q. Do you know whether physicians or surgeons coming to Tucson have come by air?

Mr. Allen: I object to that as immaterial. It can have no earthly bearing on this case.

Mr. Robertson: I think it has a very substantial and fundamental bearing. It is a matter the court is going to have to take into consideration.

The Court: The court will permit the witness to be asked if the element of coming by air for any distance is an element in fixing the fee.

Mr. Robertson:

Q. Very well. Doctor, do you consider that when a physician or surgeon comes from a point outside

(Testimony of W. Paul Holbrook.)

this state, say from New York, to perform an operation or for consultation, the fact that he may travel by air, instead of automobile, ship or other means of transportation, should enhance the amount he is to charge?

A. It would not occur to me that it would play any part in the charge at all.

Q. Now, doctor, have you become familiar with and are you able to express an opinion as to what would be a reasonable [470] fee for an eminent surgeon performing an operation in the city of Tucson, based upon the following considerations: Your knowledge of what constitutes a reasonable value for professional services of a physician or surgeon; your knowledge of the reasonableness of such fee; your knowledge of fees for such services in Tucson and other cities in the United States; the background, schooling and training of such surgeon, and any special training he has had; the time such surgeon is required to be absent from his office and practice; the distance travelled; the age and condition of such patient; the knowledge and skill required to perform such operation; the facts and circumstances tending to indicate whether or not the operation was successful and the patient could be reasonably expected to recover; the financial condition of the patient or the person responsible for the payment of such fee—do you feel you are able to express an opinion as to the reasonable value of professional services in a given case, based upon those considerations?

(Testimony of W. Paul Holbrook.)

Mr. Allen: I wish to object to the foundational question, and in this instance, I wish to urge that the Court depart from the past procedure, because of the different circumstances which prevail here. This foundational question calls for the opinion of an internist upon the question of fees of a surgeon, and the testimony of this witness clearly shows that in the light of the law, such [471] opinion is not material; and I object to the foundational question on the ground that there is no foundation for the same, and that in no circumstances could this witness ever qualify as an expert in this case. Surgeons to surgeons, lawyers to lawyers, internists to internists, is the law of the case. I can read some law on the question, if desired. I heartily approve of the court's decision to receive the testimony of all experts who may qualify under any theory, but here is such a gross departure from any possible qualification——

The Court: The witness on the stand is no more qualified to pass on the operation than a dentist would be. Is that what you say?

Mr. Allen: I don't believe he is a bit more qualified than a blacksmith, so far as the fee, or the reasonableness of the fee of a surgeon is concerned, with all due respect for Dr. Holbrook's qualifications as an internist. He is not a surgeon and cannot possibly express an opinion on this matter, except from unmitigated hearsay.

Mr. Robertson: I don't believe there is any

(Testimony of W. Paul Holbrook.)

branch of the medical study, and particularly where a man has a broader scope of knowledge of everything pertaining to surgery, medications, [472] pathology, clinical symptoms, and everything that goes into the treatment of sick persons than a diagnostician. Dr. Holbrook says that he is an internist and diagnostician. A diagnostician has to have a fundamental knowledge of the pathology, the symptoms, and everything on a much broader scale than anyone who is practicing in any particular little line of the entire practice. He more closely approaches a general practicing attorney.

The Court: This question is one I think the court should inquire into. My conception of internship is that that is a term of apprenticeship, after obtaining his degree in medicine.

Mr. Allen: I meant to say one engaged in the practice of internal medicine. I call the court's attention of Jones on Evidence, Vol. 2, Section 386, the statement appearing on page 730: "As to the value of professional services, only persons engaged in that profession may express opinions." There is a clear distinction between the practices of internal medicine, with a specialty in diagnosis, and the practice of surgery, and I have other cases to the effect that only a surgeon is qualified to testify as to the fee of a surgeon.

The Court: You ask the court to strike out the entire testimony of [473] Dr. Holbrook? I will not do that until I have examined the authorities.

(Testimony of W. Paul Holbrook.)

Mr. Robertson:

Q. Doctor, are you still in your internship?

A. No, sir.

Q. Will you tell the court generally the nature of your work as a diagnostician, having particularly in mind its relation to surgery?

A. My work consists of—

The Court:

Q. Let me ask at the outset of your testimony, in response to Mr. Robertson's question as to your qualification, what were the terms you used?

A. When one graduates from medical school and finishes his internship, and then does several years of post-graduate work, he goes usually toward general practice or as a specialist. Most men do general post-graduate toward surgery or toward diagnosis. The job of the diagnostician is to examine a patient, find all that is wrong with him if he can. He calls a surgeon after he has decided, for instance, that the gall bladder needs removing. He calls the surgeon and says "This patient has a gall bladder". The surgeon will concur in the diagnosis and remove the gall bladder. The internist or diagnostician is the one ordinarily who calls the surgeon to see a patient who has a problem of one kind or another, [474] and arranges with the surgeon for the operation.

Mr. Robertson:

Q. Then, in pursuing your profession, doctor,

(Testimony of W. Paul Holbrook.)

have you become acquainted with the schedule of fees, or the way surgeons estimate their fees?

A. I deal with it all of the time.

Q. Would you say your knowledge is limited only to Tucson, or the general practice over the United States?

A. I see a great deal of it over the whole country in my professional activity.

Q. Your patients come, I presume, from all over the country?

A. Yes, that is correct.

Q. Do you have to work with doctors from other various communities?

A. Correct.

Q. In that way, have you gained information as to the basis on which those doctors or surgeons fix their fees?

A. I think so, without any question.

Q. Do you have such knowledge along the eastern seaboard and in New York?

A. Yes, sure.

Q. Doctor, you are not acquainted with Dr. Edward J. Donovan, the plaintiff in this action?

A. I am not.

Q. And you know nothing of the facts relating to the operation that he performed upon the Jeffcott baby, other than in a pre-trial discussion you had with me? [475]

A. I do not.

Q. Doctor, I will ask you to confine your opinion to the facts I narrate to you in this hypothetical question. Assume that Dr. Edward J. Donovan, who maintains offices at 826 Park Avenue, in the city of New York, after having fulfilled his educational

(Testimony of W. Paul Holbrook.)

study, had reached the point where he was considered as one of the eminent baby surgeons in New York and had attained some national recognition as being outstanding in his line of practice; that on the 31st day of March, 1939, Drs. Tappan and Thompson and Carrell diagnosed the condition of Robert Jeffcott, the son of Mr. and Mrs. Jeffcott, the defendants in this action, as consisting of complete obstruction of the small intestine, due to volvulus, and determined that an operation would be necessary; that they so advised Mr. and Mrs. Jeffcott, and Dr. Thompson, being acquainted with Dr. Donovan, recommended that he be called to perform an operation, and that Dr. Thompson called Dr. Donovan and suggested that the baby be brought back to New York by airplane and the operation be there performed; that Dr. Donovan agreed to perform the operation; that after the telephone call it was concluded by the doctors and the parents that Dr. Donovan should be consulted to see if he would, in turn, come to Tucson to perform the operation; that during the course of these discussions, Dr. Donovan inquired as to the financial circumstances of Mr. and Mrs. Jeffcott, and that Dr. Thompson told him [476] that cost was no item, or expense was no item; that Dr. Thompson had previously discussed the matter with Mr. Jeffcott, and asked him if expense was any item, and Mr. Jeffcott had either told him that expense was no item, or nothing within reason; that Dr. Donovan agreed to come to Tucson; that he left New York Saturday night by plane, and

(Testimony of W. Paul Holbrook.)

arrived in Tucson Sunday morning; that upon reaching Tucson he conferred with Drs. Thompson, Tappan and Carrell, examined the charts and clinical evidence, and agreed with them in their diagnosis, confirmed their diagnosis, performed the operation, and, in the course of the operation, he found the following pathology to exist: That there was no fusion between the gastro-colic omentum and the transverse mesocolon of such infant; that the cecum and the ascending colon of such infant lay in the upper right quadrant of the abdomen; that the small intestine of such infant, beginning at a point about twenty centimeters from where the duodenal-jejunal junction should be, was turned to the right, around the root of the mesentery; about two and one-half complete turns; that the lower half of this intestine was blue and completely collapsed; that the terminal ileum of such infant was bound down to its mesentery by a definite, firm band which almost completely kinked it; and that the duodenum of such infant instead of taking its normal course passed downwards and emerged from its retroperitoneal position by passing through an opening in the [477] mesentery of the terminal ileum about ten centimeters from the ileocecal junction; and if it be further assumed that the said Dr. Donovan, in the further course of performing such operation at such time and place and in the further course of his said employment undertaking, did enter such infant by and through a right rectus incision, did bring

(Testimony of W. Paul Holbrook.)

the cecum of such infant down to its normal position, did cut away the band on the ileum of such infant, did then untwist the volvulus by turning all of the small intestine of such infant about two and one-half turns in a counter-clockwise direction, did then attach the cecum of such infant to the parietal peritoneum in the right lower quadrant of the abdomen of such infant by the use of two interrupted sutures of chromic and did then complete such operation by closing the abdomen of such infant in layers; and if it be further assumed that Dr. Donovan remained in Tucson until the following morning, Monday morning, leaving Tucson at eleven o'clock, and returned by air to New York City; and was back in the City of New York Tuesday afternoon; and that while he was in Tucson, he examined the data and reports on one or two occasions, and, after his return to New York, communicated with Dr. Thompson by telephone and telegram on several occasions; and if it be assumed that there was no discussion had while he was in the city of New York as to the financial condition of the parents, and that after his return, on May 1st, he sent a statement to Mr. Jeffcott in the sum of twelve thousand [478] five hundred dollars; and that at the time the statement was sent, he had not had any discussion with Mr. Jeffcott relating to his financial circumstances; and if it be assumed that the baby survived the operation; that he was required to stay in the hospital some six weeks after the operation,

(Testimony of W. Paul Holbrook.)

and had a fecal fistula condition which lasted for some eight months, and at the present time is suffering from a hernia, but otherwise the operation was successful; and if it be assumed, doctor, that at the time of the employment of Dr. Donovan by Mr. Jeffcott that Mr. Jeffcott was engaged in the ranching business in the southern part of Arizona, his total assets consisting of a ranch having a value of \$150,000, against which there was an indebtedness of approximately \$75,000; that his income for that year amounted to \$8,000; that his ranch operating expenses amounted to \$11,000; but that this fact, or the fact that his operating expenses exceeded his income by about \$3,000 was because his ranch was in its formative stage, and he was purchasing cattle and not selling off any cattle, from the proceeds of which he could pay such operating expenses; but that the subsequent operation of the ranch indicates at this time, although it is still being operated at a loss, that he can expect a net income from his ranching operations of from \$5,000 to \$8,000, separate and apart from all living expenses, which are not included in any of the figures I am giving you; and taking all of those factors [479] into consideration, doctor, I will ask you to state whether or not you can express an opinion as to the reasonable value of the services of Dr. Donovan in performing that operation, in coming to Tucson, and returning to New York?

Mr. Allen: I make the same objection to the foundational question, your Honor.

(Testimony of W. Paul Holbrook.)

The Court: The objection you have added to since the other objection is that the witness on the stand is not qualified to express an opinion as to these particular surgical services, because he is a doctor of medicine.

Mr. Allen: There is no foundation for this foundational question.

The Court: The question may be answered and the ruling reserved.

The Witness: May I clarify it with the attorneys, to see if I understand it?

The Court: All right.

The Witness: As I understand it, Dr. Donovan left Saturday afternoon [480] and returned Tuesday afternoon, and that while here he operated this child for congenital volvulus.

Mr. Allen: I think the question is clear and move that this colloquy be stricken.

Mr. Robertson: He can state whether or not he can state an opinion, and I submit that he may ask any questions he would like to have clarified.

The Court: You have heard the hypothetical question?

The Witness: Yes.

Mr. Robertson: You can express an opinion——

The Witness: That the child was operated and the doctor returned to New York; that the parents of the child have as total assets, or all that they have in the world, is a ranch which at present has no income, but which eventually will bring an in-

(Testimony of W. Paul Holbrook.)

come of from five to eight thousand dollars. I am concerned about the income of the parents, because that is what doctors usually base their fees on. [481]

Mr. Allen: I again ask that the conversation be stricken, and that the witness be instructed that the question calls for a "yes" or "no" answer.

The Witness:

A. I have answered yes that I can testify to its value.

Mr. Robertson:

Q. Will you give us your opinion as to the reasonable value of those services?

Mr. Allen: I object to any opinion on the part of this witness, first, on the ground that he has shown definitely that he is entirely unqualified to give an opinion, and, secondly, that the hypothetical question propounder to him is improper because it contains many assumptions which are without the evidence in this case; further that the hypothetical question does not fairly represent the matter to the expert.

Mr. Robertson: May I ask Mr. Allen to point out to the Court the elements wherein the question is deficient?

The Court: The witness may answer the question with the understanding that if there are elements not borne out by the record, and, with a long question like that, the Court [482] would hesitate to hazard an opinion without examination of the several elements.

(Testimony of W. Paul Holbrook.)

Mr. Robertson:

Q. Doctor, based upon the facts as I gave them to you, and as you now understand them, will you now express your opinion as to the reasonable value of your services?

A. I should say a specialist coming from New York might be entitled to double the fee a local specialist would charge, which, at most, would be ten per cent of the man's annual income. That would be my rough estimation of the value of such services.

Q. Do you take into consideration the true annual income of 1939, when the operation was performed, or what his expected income will be?

Mr. Allen: I object to that as wholly immaterial and improper. The doctor has testified as to what he thinks the fee should be, and he says it should be twenty per cent of the annual income, and if there is no annual income, it would be zero.

(There was no ruling upon this objection, and no answer.)

Mr. Robertson:

Q. Assuming that at the time the operation was performed, [483] the ranch was in its formative stage, its gross worth was \$150,000, subject to an indebtedness of \$75,000, and your answer was that you would fix the fee as twenty per cent of his annual income?

A. Average annual income.

Q. Would you project that into the future, when

(Testimony of W. Paul Holbrook.)

his plan for developing his ranch had materialized, and his average income was then determined?

Mr. Allen: Objected to because of the nebulous character of the examination.

The Court: The objection is good.

Mr. Robertson:

Q. In dollars and cents, doctor, based on the statement of his financial condition and the plan he had, what fee would you expect him to pay for the services performed? Can you give us something in dollars and cents?

Mr. Allen: Same objection that went to the original hypothetical question.

The Court: The witness may answer the question. [484]

A. From my understanding of his circumstances, I would say something like \$2,000. That is as near as I could come to it. He is not a pauper, certainly.

Mr. Robertson: You may cross-examine.

Cross-examination

By Mr. Allen:

Q. You are not a surgeon?

A. I have a degree in surgery, but I do not practice surgery.

Q. You have never practiced surgery?

A. Yes, I have.

Q. When and for how long?

A. For two years.

(Testimony of W. Paul Holbrook.)

Q. Since then you have practiced medicine as distinguished from surgery?

A. Yes, that is correct.

Mr. Allen: No further question.

Mr. Robertson: That is all. It is my understanding that each of the doctors may be excused.

The Court: Yes.

Mr. Robertson: I wonder if I might have about five minutes. I think [485] I am about ready to close my case.

The Court: We will recess for ten minutes.

Mr. Robertson: If your Honor please, I have no more testimony, but I would like to offer in evidence Defendant's Exhibit A, which sets forth the figures Mr. Jeffcott used in his testimony.

The Court: All right, it will be admitted.

Financial Statement admitted in evidence and marked Defendants' Exhibit A.

[Defendants' Exhibit A is set out at page 23 of this printed record.]

Mr. Allen: I move for recess until tomorrow morning at the usual time. I had no way to estimate the length of time that would be consumed by the defendants' testimony. I understood there would be four expert witnesses, and our rebuttal testimony will be from physicians, and I had indicated to them they would not be required until tomorrow morning.

The Court: Your rebuttal will be limited to testimony by physicians?

Mr. Allen: Yes, and incidentally it will be quite brief. [486]

The court convened at ten o'clock in the morning, February 3, 1942, with the same appearances as at previous sessions during this trial.

Mr. Allen: Call Dr. Thompson.

HUGH C. THOMPSON

called as a witness on behalf of the plaintiff, and having been previously duly sworn, was called in rebuttal, and testified as follows:

By Mr. Allen:

Q. In the course of the conversations which you had with Mr. David C. Jeffcott, on or about March 31, 1939, relative to the employment of Dr. Donovan, was any statement made to you with reference to putting pressure upon Dr. Donovan to compel him to come here?

Mr. Robertson: Just a moment. I object to that as improper rebuttal.

Mr. Allen: If your Honor please, the denial of that was made by defendant on cross-examination, and I think is entitled to be rebutted at any time during the trial. [487]

Mr. Robertson: He brought that out when he put Mr. Jeffcott on in cross-examination, in his cross, and it is improper rebuttal at this time.

The Court: The objection is overruled and the witness may answer the question.

(Testimony of Hugh C. Thompson.)

A. When I was discussing with Mr. Jeffcott the possibility of Dr. Donovan coming here, Mr. Jeffcott suggested that if Dr. Donovan was reluctant to come that pressure might be put on him by Dr. Palmer, connected with the Presbyterian Hospital, and whom I understand is a good friend of Mr. Jeffcott's father.

Mr. Allen:

Q. Now, Dr. Thompson, you continued in attendance on the Jeffcott infant subsequent to the operation, did you not? A. Yes.

Q. And you made certain reports to Dr. Donovan relative to the fecal fistula developed by that infant, did you not? A. Yes, sir.

Letter marked Plaintiff's Exhibit No. 7 for Identification.

Q. Handing you Plaintiff's Exhibit 7 for Identification, Dr. Thompson, I will ask you to state what that document is. [488]

A. A letter I wrote Dr. Donovan on April 29, 1939.

Q. I ask if it constitutes a report concerning the fecal fistula which the baby had developed at that time. A. It does.

Mr. Robertson: I object to that, as the letter is the best evidence, and move to strike the answer.

(No ruling.)

Mr. Allen: I ask that Plaintiff's Exhibit 7 for Identification be admitted in evidence.

The Court: Is there any objection?

(Testimony of Hugh C. Thompson.)

Mr. Robertson: Not to the offer. I object to the previous question and move to strike the answer, and object to the offer as being improper rebuttal.

Mr. Allen: I asked the question as having a bearing on the fecal fistula that was brought out as one of the assumptions in each of the hypothetical questions—the duration of the fecal fistula was brought out in each hypothetical question.

The Court: Objection overruled. [489]

Mr. Allen:

Q. What was the condition of the fecal fistula at the time of that communication?

A. It was a very small opening in the wound from which exuded from time to time a small amount of fluid.

Q. Was there any excretion of fecal matter at that time? A. No, sir.

Mr. Allen: Please mark this Plaintiff's Exhibit 8 for Identification.

Letter marked Plaintiff's Exhibit 8 for Identification.

Mr. Robertson: I make the same objection.

The Court: It relates to the same matter?

Mr. Allen: Yes, your Honor. It is a report three days earlier than Exhibit 7. Is it admitted, your Honor?

The Court: Yes.

Plaintiff's Exhibit 8 for Identification admitted in evidence and given the same number in evidence.

(Testimony of Hugh C. Thompson.)

[Plaintiff's Exhibit No. 8 is set out at page 22 of this printed record.]

Mr. Allen:

Q. What was the condition of the child three days earlier, [490] on April 26th, Dr. Thompson?

A. I am afraid I would have to refresh my memory on that.

Q. I ask you to examine Plaintiff's Exhibit 8 and state whether or not that correspondence constitutes a report on the condition of the patient on April 26th. A. Yes, it does.

Q. Refreshing your memory by reference to that report, Dr. Thompson, what was the condition of the fistula on that date?

A. The fistula was getting very much smaller in size, and the amount of drainage lessening. The child's general condition was excellent.

Q. Now, Dr. Thompson, I ask you to state whether or not you made any medical report on the case of the Jeffcott infant for publication?

A. Yes, I did.

Q. And where was that report published, Dr. Thompson?

Mr. Robertson: I object to the question because this certainly is improper rebuttal.

Mr. Allen: I will avow it has to do with the fecal fistula and the course thereof. It is a foundational question.

Mr. Robertson: He had Dr. Thompson here and had a chance at this in his case in chief, and now

(Testimony of Hugh C. Thompson.)

he comes along in his [491] so-called rebuttal——

Mr. Allen: I want to rebut the testimony that this fecal fistula remained in existence for eight months, or for more than one year.

The Court: The matter of the condition of the child after the operation was raised, I think, by the defendants' case, on direct examination.

Mr. Allen: That is the theory on which the testimony is offered.

Mr. Robertson: It was brought out in his case in chief.

The Court: In offering testimony along that line from Dr. Thompson, what is the matter you are directing your attention to now?

Mr. Allen: The fecal fistula and its duration.

The Court: In this case?

Mr. Allen: Yes, in this case. [492]

The Court: And you are now refreshing his memory as to that?

Mr. Allen: For the purpose of refreshing his memory, if necessary, as to the condition of that infant within a certain time after the operation was performed.

The Court: Very well. You have your objection in the record, Mr. Robertson.

Mr. Allen:

Q. Now, Dr. Thompson, what was the condition of the Jeffcott infant in reference to the fecal fistula when discharged from the Desert Sanatorium on or about May 9, 1939, at the age of forty-six days?

(Testimony of Hugh C. Thompson.)

A. There was a very small opening present, not large enough to insert a probe in, at least it would have been difficult, and from that came occasionally a very small amount of fluid. It did necessitate a dressing on the child.

Q. Approximately how long had it been since there had been any fecal discharge from that small opening?

A. I think I would have to refresh my mind to be accurate on that from that report. As I recall, there was a fecal discharge for about two to three weeks. I believe I have it in that report.

Q. Referring you to pages 237 and 238 of this report, will you refresh your memory in that respect? [493]

A. Fecal material came through for from two to three weeks. After that the drainage was fluid. Perhaps, sir, I should explain, if it has not been done, what we are talking about a little more.

Mr. Robertson: I object to any voluntary expression.

The Court: Yes, Mr. Witness.

Mr. Allen: Plaintiff's Exhibit 9 for Identification is offered in evidence. (Printed report.)

Mr. Robertson: Objected to for the same reason.

The Court: You only examined the doctor on this report that he prepared on this particular case?

Mr. Allen: Merely to the extent that he refreshed his memory.

The Court: I do not see the necessity for admitting it, if it is for that purpose only.

(Testimony of Hugh C. Thompson.)

Mr. Allen:

Very well, your Honor. [494]

Q. Now, Dr. Thompson, you previously testified that you examined the Jeffcott infant on or about the first of October, 1939. What were your findings at that time, Dr. Thompson, with reference to the existence either of fecal fistula or incisional hernia?

A. At that time there was a very tiny spot in the wound from which I was told there occurred perhaps a quarter of a teaspoon of drainage during certain twenty-four hour periods. As regards the incisional hernia, I did not find any. I found no incisional hernia with the child at any time when I examined it.

Q. Was there any indication on or about October 1st of any fecal drainage? A. No, sir.

Q. Was the opening of such a nature, Dr. Thompson as to indicate that a fecal fistula was present at such a time?

A. No fecal material could have come out of that opening.

Q. Now, Dr. Thompson, what part is played in the determination of the presence or absence of fecal fistula in the use of a probe, as mentioned by you?

A. A probe merely indicates the size of the opening; that is, if you can pass a probe in easily, you know the opening is that big. If you cannot, you know it is smaller.

Q. I ask you to state whether or not you had a conversation with Dr. Carrell relative to the

(Testimony of Hugh C. Thompson.)

fee charged by Dr. Dono- [495] van, such conversation taking place at Dr. Carrell's home, he and you being the only ones present, and such conversation taking place approximately during the first half of August, 1939? A. I did.

Q. I ask you to state whether or not that conversation was had as a result of your receiving from Dr. Donovan an inquiry concerning the payment of the fee for the operation he performed upon the Jeffcott baby. A. It was.

Mr. Robertson: I object to the introduction of this testimony, and move to strike the answer.

Mr. Allen:

Q. For the purpose of impeachment, I will ask you to state, Dr. Thompson, whether, in the course of such conversation, Dr. Carrell made the following statement to you, under the circumstances previously mentioned to you, such conversation being either exactly or in substance as follows: "I believe that had Dr. Donovan's statement been for any amount between five thousand and seventy-five hundred dollars that it would have been regarded as reasonable and would have been paid long since."

Mr. Robertson: Just a moment, there are new elements in that question that were not in the question asked Dr. Carrell when he [496] was on the stand yesterday. I would like to have Mrs. Burges find it for us, if possible. I think he said yesterday simply "Had the bill been for five thousand dollars

(Testimony of Hugh C. Thompson.)

or seventy-five hundred dollars, it would have been paid.”

The Court: The question is whether or not that statement was made.

Mr. Robertson: Yes, but before you can impeach a witness you have to lay the foundation and Mr. Allen is only permitted to ask the same question he asked Dr. Carrell yesterday and I don't remember anything in that question about whether the fee would have been regarded as reasonable.

Mr. Allen: I asked Dr. Carrell if he did not indicate to Dr. Thompson in that conversation that the fee would have been regarded as reasonable if it were in such an amount.

Mr. Robertson: Very well.

The Witness: What is the question?

The Reporter: (Reading)

Q. For the purpose of impeachment, I will ask you to state, Dr. Thompson, whether, in the course of such con- [497] versation, Dr. Carroll made the following statement to you, under the circumstances previously mentioned to you, such conversation being either exactly or in substance as follows: “I believe that had Dr. Donovan's statement been for any amount between five thousand and seventy-five hundred dollars that it would have been regarded as reasonable and would have been paid long since.”

A. That statement was made by Dr. Carrell.

(Testimony of Hugh C. Thompson.)

Cross Examination

By Mr. Robertson:

Q. Dr. Thompson, how long have you been practicing?

A. I started in private practice in October, 1933.

Q. How long did you practice in New York?

Mr. Allen: Object to that as improper cross-examination.

Mr. Robertson: It is a preliminary question.

The Court: The qualifications were gone over on direct, and particularly on the cross-examination, so I do not consider that is properly within the line of examination now.

Mr. Robertson:

Q. When did you first discuss this matter with Mr. Allen? [498]

A. I don't remember, Mr. Robertson.

Q. At any rate, it was before you got on the stand the other day to testify?

A. That is right.

Q. Did you have the consent of Mr. and Mrs. Jeffcott to discuss this matter with Mr. Allen?

A. Which matter?

Q. Any matter pertaining to the condition of this baby or the fee that was charged or any other matter that you acquired knowledge of in the course of your professional representation of Mr. and Mrs. Jeffcott?

A. No, I had no consent from Mr. and Mrs. Jeffcott.

(Testimony of Hugh C. Thompson.)

Q. And do you appreciate the privilege that exists on communications between a patient and a doctor? A. Yes.

Q. Did you have that in mind when you were talking to Mr. Allen?

A. Yes, everything I have said in reference to the case has been published in medical literature. I think you will find that there. I mean that everything I have told about the case itself, as a case, is there.

Q. Did you say anything in that publication about Mr. Jeffcott telling you he could put pressure on Dr. Donovan through Dr. Palmer?

A. No, of course not.

Q. Is there anything in that publication about expense being no consideration? [499]

A. No, of course not.

Q. About Dr. Carrell telling you if the bill had been for five thousand dollars or seventy-five hundred dollars, it would have been reasonable, and would have been paid? A. No, sir.

Mr. Allen: I object to this line of examination. It is improper, no objection having been made to any such testimony.

Mr. Robertson: It is pertaining to the very thing he has just testified to.

The Court: The witness has already answered the questions.

The Court: The witness has already answered the questions. Do you want to continue your examination along that line?

(Testimony of Hugh C. Thompson.)

Mr. Robertson: I may have a few more questions.

The Court: Go ahead.

Mr. Robertson:

Q. All of those were communications you received during the [500] time when you were the physician, the pediatrician in charge of the baby, weren't they?

Mr. Allen: Same objection.

The Court: Objection overruled.

The Witness: I did not quite get that question, all of those things?

Mr. Robertson:

Q. The things I have just enumerated to you.

A. Mr. Robertson——

Q. Will you please answer the question?

A. Yes, sir, they were. I——

Mr. Robertson: I submit the question has been answered.

Mr. Allen: The witness has a right to explain his answer.

The Court: Go ahead. Go ahead.

Mr. Robertson:

Q. You discussed this matter with Mr. Allen when a suit was pending against Mr. Jeffcott, the people who employed you to take care of this child? [501]

A. That is correct.

Q. Are you not aware that Dr. Carrell said, if he said anything, that if the figure had been between

(Testimony of Hugh C. Thompson.)

five thousand and seventy-five hundred dollars, it probably would have been paid?

A. I cannot tell you at this time the exact words, Dr. Carrell used. He did not bind the Jeffcotts. He did not represent them. It was a personal conversation. I went to him because he was a good friend of the Jeffcotts, and had been in on this case. I knew he would be apt to know more about their reaction than I would, and I wanted his idea, because I was disturbed.

Q. And it is just as likely that he said that if the figure had been between five thousand and seventy-five hundred dollars the bill would probably have been paid, as to have used the words Mr. Allen used?

A. He gave me the definite impression that it was his feeling.

Mr. Robertson: I object to the definite impression, and ask that the witness be instructed to answer my question.

The Court: Give as nearly as you recall the words of the conversation.

A. May I have the question again?

The Reporter: (Reading)

Q. And it is just as likely that he said that if the figure [502] had been between five thousand and seventy-five hundred dollars the bill would probably have been paid, as to have used the words Mr. Allen used?

(Testimony of Hugh C. Thompson.)

A. The question of reasonableness did not enter into our conversation.

Mr. Robertson: I move to strike that because it is not responsive.

A. But it is——

The Court: Don't argue. Read the question again.

The Reporter: (Reading)

Q. And it is just as likely that he said that if the figure had been between five thousand and seventy-five hundred dollars the bill would probably have been paid, as to have used the words Mr. Allen used?

A. No, sir.

Mr. Robertson:

Q. Is it your desire to testify that Dr. Carrell told you that in his opinion that that bill, or if a bill had been for five thousand or seven thousand five hundred dollars, that it would have been considered reasonable?

A. Yes, sir.

Q. And you cannot recall the exact words he used? [503]

A. No, sir, I cannot.

Q. And did you tell him that without consideration of the financial conditions of the patient, you thought twelve thousand dollars was a reasonable fee?

A. I made no comment to Dr. Carrell that night.

Q. Didn't you feel called upon to express your ideas when you went there to discuss the matter?

A. No, sir.

(Testimony of Hugh C. Thompson.)

Q. You did think that a fee of twelve thousand five hundred dollars was entirely out of reason, did you not? A. No, sir.

Q. Do you still refuse to give any consideration to the financial condition of the party who is to pay the fee? A. No.

Q. But you have not given any consideration to it when you say that that fee is reasonable, have you?

A. That is correct. You will recall my statement here before I specified that.

Q. Yes, doctor, I well recall your statement. This hernia you speak of was first discovered by Dr. Carrell shortly after your visit around the first part of October, 1939. Is that not true?

A. I don't know.

Q. Did you ever see the baby after that?

A. I do not recollect, Mr. Robinson, that I ever did see the baby after that.

Mr. Robertson: That is all. [504]

Re-direct Examination

By Mr. Allen:

Q. What explanation did you desire to make in connection with one of your answers to Mr. Robertson's examination?

Mr. Robertson: I object to the form of the question. Mr. Allen can specify what the question was and what the answer was.

(Testimony of Hugh C. Thompson.)

Mr. Allen:

Q. Relative to the statements made to you by Mr. and Mrs. Jefficot in the course of handling this case.

A. What I wanted to say was that I think that the medical profession regard a discussion of a fee for a case as somewhat different from revealing the medical details of the case.

Mr. Robertson: I move to strike the answer. It is argumentative and could have no bearing on the case whatsoever, because the law clearly defines what a communication amounts to between a doctor and a patient.

The Court: If there is any point in that, it is a matter for discussion.

Mr. Robertson: But in permitting a witness to answer the question [505] is evading the province of the court.

The Court: It may go out—be stricken from the record.

EDWARD J. DONOVAN

the plaintiff herein, having been called as a witness in his own behalf, and having been heretofore duly sworn, was called in rebuttal and testified as follows:

Direct Examination

By Mr. Allen:

Q. Dr. Donovan, just what is fecal fistula?

Mr. Robertson: If the Court please, I object to

(Testimony of Edward J. Donovan.)

that, because Dr. Donovan testified regarding this matter on his direct examination.

Mr. Allen: I don't believe there has been any definition of fecal fistula. Causes were gone into and this is along the same line of the rebuttal offered by Dr. Thompson regarding the fecal fistula. It was brought into the case by inclusion in every hypothetical question submitted by defendants.

Mr. Robertson: Dr. Donovan testified at considerable length on his [506] direct examination by Mr. Allen, stating the cause and quite a number of the details concerning it, and it is improper rebuttal.

Mr. Allen: It is a proper foundational question.

The Court: I will permit the question to be answered.

A. A fecal fistula is a fistula that drains fecal material, and fistula is any communication from one of the hollow parts of the body with the outside, with the surface of the body. A fecal fistula, then, is a fistula which drains fecal material.

Mr. Allen:

Q. When does a fecal fistula cease to be a fecal fistula?

A. When it stops draining fecal material.

Q. What are the medical or surgical findings that result, doctor, from the ability or inability to insert a probe into such an opening?

Mr. Robertson: Same objection.

The Court: Same ruling. You may answer the question.

(Testimony of Edward J. Donovan.)

A. If you cannot insert a small probe into a known fecal [507] fistula, it means that a fistula does not exist, providing it is not draining fecal material.

Mr. Allen:

Q. If such a condition develops following a fecal fistula, but drainage from the surface opening continues, what is the condition that exists then, under those circumstances?

A. It was stated that this wound was an infected wound on the fifth day, as brought out on the testimony—that that wound was infected on the fifth day, and an infected wound may drain for a long time. The reason for that, the main, common reason for an infected wound is that there is a catgut knot present, that is a knot of catgut used in sewing up the baby's abdomen after the operation. That knot does not come out of itself, and has to stay in until it is absorbed, and then the wound heals.

Q. From the medical reports brought to your attention concerning the Jeffcott baby, how long did the fecal fistula of such infant continue?

A. As I remember, it was nineteen days. It is stated very accurately in that report or in Dr. Thompson's testimony. As I remember, it was about nineteen days.

Q. And are there any statistical findings in reference to the length of time during which a wound infection may be expected to drain, doctor?

(Testimony of Edward J. Donovan.)

Mr. Robertson: That is objected to as calling for an answer which [508] could only be based upon hearsay.

The Court: The witness may answer the question.

The Reporter: (Reading)

Q. And are there any statistical findings in reference to the length of time during which a wound infection may be expected to drain, doctor?

Mr. Allen:

Q. Wound infection in a new-born baby, doctor.

A. I can answer that but not based on statistical findings but on my own experience.

Q. I withdraw the question. What has been your experience in reference to the length of time a wound incision in a newborn baby may drain?

A. It depends entirely upon what material is used in closing the wound. If you use silk, and the wound becomes infected, the wound may drain because of the presence of the silk for months and months. That is why you use absorbable material for babies, such as catgut. A baby has a very marked reaction to chromic catgut, which merely means tanned catgut. Chromic catgut may be so tanned as to stay ten days or twenty days in a wound, and the type of catgut you use in closing a baby's wound is ordinarily ten-day or twenty-day.

The Court: The only purpose of this examination is to show the [509] causes of the fecal fistula, and whether it healed up in an abnormal or normal

(Testimony of Edward J. Donovan.)

time after the operation. Beyond that, I do not believe it is necessary to elaborate on the situation.

Mr. Allen:

That is correct.

Q. What type of hernia, Dr. Donovan, could have resulted in the case of the Jeffcott infant?

Mr. Robertson: Object to the question unless foundation is laid.

Mr. Allen:

Q. With relation to the operation that was performed by you.

Mr. Robertson: Object to the question, unless a preliminary question is asked, establishing the fact that only one type of hernia may result, as the question calls for only one type of hernia.

Mr. Allen:

Q. What type or types of hernia could have resulted in the case of the Jeffcott baby with relation to the operation performed by you?

A. The only type that could have resulted is incisional hernia, which means hernia in the incision.

Q. Might such a hernia be properly described as a ventral hernia? [510]

A. Yes, ventral merely means on the front of the patient's body, rather than the back of the patient, which is called dorsal. Ventral is on the front.

Q. In the course of your practice as a pediatric surgeon, have you had occasion to observe incisional hernia in cases of operations upon the new born?

(Testimony of Edward J. Donovan.)

A. I have, many times.

Q. Will you state, Dr. Donovan, what the ordinary course of progress of such a hernia is?

A. Ninety per cent of these hernias get well without operation.

Q. Why is that, Dr. Donovan?

A. This applies to babies, and I think you specified that. It does not apply to adults.

Q. Yes, to the new born.

A. Ninety percent of them get well without operation, and because of that fact, we have a very definite policy at the Babies Hospital that every surgeon knows he has no right to operate on that hernia until he can prove to me, or another member of the staff, that the hernia is not going to get well, due to the progress and growth and development of the infant.

Q. What may be taken to be proof that such growth and development will not take place?

A. Well, if you go for a good length of time, and then find, for example, that the hernia is getting larger, or not getting smaller—no, I would say that it is [511] not getting larger—that in itself is not an indication for operating.

Q. How far do you carry these infants post-operatively before you decide an operation is necessary?

A. You have to prove to yourself and everyone else that you have given this hernia a chance to get

(Testimony of Edward J. Donovan.)

well through the growth and development of the child. I cannot state specifically about the length of time. It may be months and it may be years.

Cross Examination

By Mr. Robertson:

Q. Dr. Donovan, where did you put these permanent stitches in the baby?

A. As I explained the other day in my testimony, they are simply non-absorbable sutures which are placed a certain distance on each side of the wound, say half an inch.

Q. You mean the incision in the outer portion of the baby?

A. No, all the way through the abdominal wall.

Q. Through the abdominal wall? A. Yes.

Q. That is the place you put the permanent sutures?

A. May I use my finger to explain. Suppose this is the incision. The permanent suture will start over here and go through all the layers of the abdominal wall, except the innermost. This is the suture and is not tied. That is put in when the rest of the wound is [512] open, and they are put half or three-quarters of an inch apart all the length of that incision.

Q. And I think it was your opinion those permanent sutures were the things that caused the wound infection?

A. No, I never made such a statement.

Q. What caused the infection?

A. As I stated in my testimony the other day—

(Testimony of Edward J. Donovan.)

Q. Go ahead.

A. A baby is always wet, his diaper is always wet, and that predisposes his wound to infection, and I stated that this wound infection might have come first down where the cecum had been sutured to the parietal peritoneum, where it had to be sutured. That infection might have started there as an abscess, and at the point where this intestine had been anchored to the peritoneum or lining of the abdomen. I stated that could have been an abscess, the infection passing through the wall of the damaged intestine. I stated also that the fact that this wound drained clear material, or material that was not feces first and then, after four days, drained feces, made one suspicious that that was the condition that existed.

Q. What do you mean by that?

A. An abscess where the cecum had been anchored, the cecum that had been damaged by the obstruction. I stated also that this might have been an infection from the outside from the baby's wet diapers all the time, and I stated [513] also it might have been infected by material passing through the wall of the secum where it was anchored to the abdominal wall; that the infection might have come from the outside in, but was very much more likely to come from the inside out.

Q. And the fact that for a period of weeks there was a fecal discharge from this wound would mean what?

A. It simply means there was a hole in the intestine and the stuff would go through to the outside.

(Testimony of Edward J. Donovan.)

Q. What is fecal matter?

A. The waste matter the patient normally excretes through his intestines.

Q. And in order for that to take a short cut, it has to come through a hole in the intestine?

A. Yes, but I did not see the hole, nor did anyone else.

Q. And all of this testimony that this infection came from post-operative attention to the outside——

A. I never made such a statement.

Q. I am asking you now if that is true?

A. That is not true.

Q. You mean to say, then that this infection, instead of originating on the outside of the baby, is due to the fact that the wound becomes infected and eats a hole into the intestine, and this causes a fecal fistula?

A. I said simply it could cause fecal fistula.

Mr. Robertson: Mrs. Burges, will you read the question? [514]

The Reporter: (Reading)

Q. You mean to say, then, that this infection, instead of originating on the outside of the baby, is due to the fact that the wound becomes infected and eats a hole into the intestine, and this causes a fecal fistula?

A. Yes, sir, it can form an abscess, just as I have explained here, and that abscess can cause the fecal fistula.

(Testimony of Edward J. Donovan.)

Mr. Robertson :

Q. Is it not much more likely the infection would spread all over the outside of the stomach without eating through the intestine? A. No.

Q. Is it not a fact that the intestines, although being very thin, are formed of material that can resist infection from the outside to the same extent it holds in the strong stomach juices on the inside?

A. No, that is not true at all.

Q. Once you get a hole in the intestine through which fecal matter is exuding, will that heal itself?

A. Positively. You could not keep it open. A hole in the lining membrane of that intestine would have to have something to hold it open or it is apt to close. If that is not present in the wound, you could not keep that fecal fistula open, in spite of yourself.

Q. In view of the fact the fecal matter started to drain a short time after the operation, is it not much more [515] likely it is due to internal infection than any infection from the outside?

A. No, that is just the right time for the infection to travel in, the fifth day.

Q. The fifth day is just the right time from the outside in or from the inside out?

A. When you find an infected wound, the first thing you think is "He has an infected wound", and if he drains fecal material, the first thing you think is "He has an infection that is travelling in."

Q. Suppose you have a wound that does not show infection for ten days?

(Testimony of Edward J. Donovan.)

A. It is very much more apt to be the other way round. That is very much more apt to be from the inside out, but you cannot say definitely. The fifth-day infected wound appeared here, and that is very apt to be the cause of the rise in temperature and drainage of fecal material. The fact that fecal material drained on the ninth day, this might be caused by an abscess around the secum, where it had been anchored to the lining membrane of the peritoneum, and I stated also that because this wound drained first material that was not feces, and then drained fecal material, that was the most likely cause of the infection. Still it could have been an abscess caused on the outside from an infected wound.

Q. Still, it could have been a hole punctured in the intestine by your needle? [516]

A. No. If that were true, it would have appeared immediately. Of course that is not true. Do you suppose if you put a needle through the intestine, you would not hear from it for nine days?

Q. I am examining you.

A. That is an answer to your question.

Q. In your opinion, what was the cause of that fecal fistula?

A. I have stated twice.

Q. State it again.

Mr. Allen: I object to the repetition. It has been gone into at great length.

The Court: Go ahead.

Mr. Robertson:

Q. What is your opinion of what caused the fecal fistula of the Jeffcott baby?

(Testimony of Edward J. Donovan.)

A. My opinion, as stated in my testimony before, is that it may have been due to two causes, just as I have stated before, and that is as close as I can get to it. I have explained my reason for it. One, the point where the already damaged intestine had been sutured to the point where it should have been, and where it was necessary to suture it, which I have called the right lower quadrant of the abdomen. I have stated it could have been an [517] abscess at that point, where that intestine was attached, and I stated my reason for thinking that.

Q. Which of the two, in your opinion, was probably the cause?

A. I cannot state. Either one may have been the cause. I may have gone so far as to state this might have been the cause, but either one may have been the cause. I cannot say what was going on inside the abdomen.

Q. And of course you know nothing about the hernia the Jeffcott baby has, and whether it will have to be operated or not? A. I never saw it.

Mr. Robertson: That is all.

Mr. Allen: That is all. doctor, the plaintiff rests, your Honor.

Mr. Robertson: At the close of the plaintiff's rebuttal, we move for judgment in favor of the defendants, because the plaintiff has failed to prove that Dr. Donovan was admitted to practice, or qualified to practice in the State of Arizona, or had any license to engage in practice here, and after that motion, we have no sur-rebuttal.

The Court: The motion will be denied. I saw the provisions of the statute before this trial started. [518]

Mr. Robertson: That is simply for the sake of the record, because the language of the statute is not entirely clear and there is some conflict of authority.

The Court: The motion will be denied. [519]

CERTIFICATE

State of Arizona,
County of Pima—ss.

I, Lenna H. Burges, certify that I am a duly qualified shorthand reporter; that I was sworn to report the trial of the case of Edward J. Donovan, plaintiff, vs. David C. Jeffcott and Elsie Jeffcott, his wife, defendants, being Civil Action, file No. 54-Tucson, in the United States District Court for the District of Arizona, on January 29, 30, 31, and February 2 and 3, 1942; that I did so report said trial, and the foregoing 519 pages of typewritten matter contain a full, true and correct transcript of my shorthand notes taken during the said trial, to the best of my skill and ability.

That I am not employed by nor related to any party to this action, nor to any attorney appearing therein, and I am not interested, directly or indirectly, with the outcome of this litigation.

Witness my hand at Tucson, Arizona, this the 18th day of July, 1942.

LENNA H. BURGESS.

[Endorsed]: No. 10251. United States Circuit Court of Appeals for the Ninth Circuit. David C. Jeffcott and Elsie Jeffcott, his wife, Appellants, vs. Edward J. Donovan, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed September 15, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

Case No. 10251

DAVID C. JEFFCOTT and ELSIE JEFFCOTT,
his wife,

Appellants,

vs.

EDWARD J. DONOVAN,

Appellee.

STATEMENT OF POINTS ON APPEAL AND
DESIGNATION OF PARTS OF RECORD

To: The Clerk of the United States Circuit Court
of Appeals for the Ninth Circuit

The appellants herein hereby adopt as their points
on appeal in this cause the Statement of Points on
Appeal appearing in the transcript of record which

has heretofore been certified to and filed with you by the Clerk of the District Court of the United States for the District of Arizona.

The appellants herein hereby request that the transcript of record as certified to by the Clerk of said District Court be printed in its entirety.

Dated this 18th day of September, 1942.

DARNELL & ROBERTSON
By LAWRENCE V. ROBERTSON

A Member of the Firm
410 Valley National
Building
Tucson, Arizona
Attorneys for Appellants.

Copy received this 18th day of September, 1942.

LESLEY B. ALLEN,
Attorney for Appellee.



No. 10251

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

DAVID C. JEFFCOTT and ELSIE JEFFCOTT, his wife,
Appellants,

vs.

EDWARD J. DONOVAN,
Appellee.

BRIEF OF APPELLANTS.

DARNELL & ROBERTSON,
410 Valley National Building, Tucson, Arizona,
Attorneys for Appellants.

FILED

NOV - 2 1942

PAUL P. O'BRIEN,
CLERK

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No. 10251

IN THE

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DAVID C. JEFFCOTT and ELSIE JEFFCOTT, his wife,
Appellants,

vs.

EDWARD J. DONOVAN,
Appellee.

BRIEF OF APPELLANT.

Jurisdiction.

This is an action filed by Edward J. Donovan, a resident of the State of New Jersey, in the District Court of the United States for the District of Arizona against David C. Jeffcott and Elsie Jeffcott, his wife, both of whom are residents of the State and District of Arizona.

The trial was had upon plaintiff's amended complaint [Tr. p. 5], and the issues joined by defendants' answer [Tr. p. 1], pursuant to stipulation [Tr. p. 67] permitting the filing of the amended complaint and providing that the original answer would stand as to the amended complaint. In the complaint the plaintiff seeks to recover the balance of \$10,000.00 claimed to be owing for professional services rendered by the plaintiff to the defendants for an operation

and medical attention rendered the infant son of said defendants, Robert Crawford Jeffcott. The plaintiff charged \$12,500.00 and had been paid \$2,500.00 prior to the filing of the action. The complaint alleged that the sum of \$12,500.00 was the reasonable value of such services. Defendants' answer denies this allegation and alleges that the sum of \$2,500.00 was adequate compensation. After trial in the District Court of the United States for the District of Arizona in Tucson, Arizona, commencing before the court on the 29th day of January, 1942, and continuing thereafter on the 29th, 30th and 31st of January, and the 2nd and 3rd of February, judgment was ordered for the plaintiff [Tr. p. 24] in the sum of \$7,500.00, less a credit of \$2,500.00, or a net recovery of \$5,000.00. Counsel was ordered to prepare and submit findings of fact and conclusions of law and form of judgment. Preliminary findings of fact, etc. [Tr. p. 26] were filed by the plaintiff. Objections to findings of fact and conclusions of law were filed by the defendants [Tr. p. 36] and offered amended and additional findings of fact were filed [Tr. p. 40]. The court entered its order thereon [Tr. p. 43] and final findings of fact and conclusions of law [Tr. p. 44] were made by the court on April 10th, 1942. Objections to final findings of fact and conclusions of law were filed by the defendants [Tr. p. 55] which were overruled by order of the court [Tr. p. 58] and formal judgment was entered [Tr. p. 59] awarding the plaintiff \$5,000.00, with interest at 6% from the date of entry of judgment. A motion for new trial was filed [Tr. p. 62], with memorandum in support thereof [Tr. p. 63], which was denied by order of court [Tr. p. 67]. Notice of appeal was filed on July 8th, 1942 [Tr. p. 69] and a cash bond in the sum of \$5,250.00 was filed on July 8th, 1942, pursuant to stipula-

tion of counsel [Tr. pp. 67-68], which stipulation was approved by order of court entered July 8th, 1942 [Tr. p. 69]. An order extending time for filing abstract of record was entered August 3rd, 1942 [Tr. p. 73], extending such time for thirty days from and after August 17th, 1942. Designation of record on appeal [Tr. p. 24] was filed August 19th, 1942, and defendants' statement of points on appeal was filed on the same date [Tr. p. 76]. A certified written transcript of record of the clerk of the District Court was filed with the clerk of the United States Circuit Court of Appeals on September 15th, 1942. Appellants' statement of points on appeal and designation of parts of record was filed in the office of the clerk of this Court on the 21st day of September, 1942. The transcript of record of the clerk was mailed to appellants on October 9th, 1942, and notice directed to attorneys requiring appellants' brief to be filed not later than November 11th, 1942.

Statement of the Case.

David C. Jeffcott and Elsie Jeffcott, his wife, came to Arizona in 1936 because Mr. Jeffcott was suffering from tuberculosis of the lungs [Tr. p. 418]. He was forced to lead an inactive life and at that time was living on the income and a certain amount of the principal from a gift of stocks and bonds made by his father in 1935, such stocks and bonds having a market value of between \$75,000.00 and \$100,000.00 on the date of the gift [Tr. p. 419]. In December of 1936 Mr. Jeffcott made a down payment on a cattle ranch located near Patagonia, Arizona, of \$50,000.00 [Tr. p. 420]. The ranch was bare and in a run-down condition and after getting possession late in 1937

he undertook to stock the ranch and rehabilitate [Tr. pp. 421-423]. He exhausted the money he had received from the sale of the stocks and bonds given him by his father [Tr. p. 423] and he was forced to borrow additional money from his father under an arrangement whereby his father agreed to loan him money until the ranch was stocked and put on a paying basis, with the understanding that when the total amount was determined, a real estate and chattel mortgage would be executed to bear interest at the rate of $3\frac{1}{2}\%$ per annum and to be amortized over a period of years [Tr. pp. 425-426]. Mr. Jeffcott kept his books on a cash basis for 1937, 1938 and the first half of 1939 and an auditor set up his books on an accrual basis on June 30th, 1939 [Tr. p. 426]. A real estate and chattel mortgage in the sum of \$69,500.00 [Tr. p. 437] was executed in August of 1939 with his mother named as the mortgagee [Tr. p. 424]. In view of the run down condition of the ranch and the necessity for building up a herd, the ranch operations during 1938 showed a loss of \$14,572.37 [Tr. p. 23]. Mr. Jeffcott's personal income amounted to \$403.22; his personal expenses, \$15,572.72, in view of the fact that he was required to pay \$5,517.72 [Tr. p. 23] Federal income tax on the stocks and bonds which had been transferred to him by his father. Many items of expense which would normally have been charged to ranch operations were shown in his personal expenses for that year as the books were not properly set up [Tr. pp. 431-432]. During 1939 his total income from cattle inventory increase and sales was \$16,932.83 and ranch expenses were \$17,362.91, or a loss of \$430.09 [Tr. p. 23]. His personal expenses for that year were \$12,983.47, which included between \$6,000.00 and \$6,500.00 worth of expense incurred on behalf of his infant son, Robert Craw-

ford Jeffcott 2d, who was operated by Dr. Donovan and who received \$2,500.00 on account which was included in such personal expenses [Tr. pp. 432-433]. In 1940 the ranch operations showed a loss of \$1,783.50. Mr. Jeffcott had personal income of \$130.00 and personal expenses of \$6,305.32. In 1941 his ranch operations showed a loss of \$1,331.33 [Tr. p. 23]. He received personal dividends of \$90.00 and his personal expenses were \$6,277.82 [Tr. pp. 435-436]. In 1942, assuming the market to remain constant, he anticipates a net profit from ranch operations of between \$5,000.00 and \$8,000.00 [Tr. p. 436]. During these expansion and development years, it was necessary for the mortgage to be increased by continued borrowing from his father so that the mortgage at the time of trial amounted to \$128,292.37. His equity at that time was \$57,667.19 [Tr. p. 437]. At the time of the operation which was performed by Dr. Donovan on April 1st, 1939, the mortgage was approximately the same as it was on June 1st, 1939, to-wit, \$69,500.00, and his equity was approximately \$79,613.91 [Tr. p. 437].

On March 25th, 1939, Robert Crawford Jeffcott, 2d, was born to David C. Jeffcott and Elsie Jeffcott, his wife, in the Desert Sanatorium in Tucson, Arizona [Tr. p. 82]. Dr. William D. Carrell delivered the baby and after complications developed, Dr. Hugh Thompson and Dr. Vivian Tappan attended as pediatrician and consultant. On Friday, March 31st, 1939, it was determined that the child had an intestinal obstruction and it was agreed between the doctors that Dr. Edward J. Donovan of New York City be employed to operate. At the suggestion of these doctors, Mr. Jeffcott agreed to such employment and Dr. Hugh Thompson called Dr. Donovan.

Dr. Donovan was selected because he is one of, if not the most outstanding baby surgeon in the country. Dr. Thompson so testified [Tr. p. 148]; Dr. Donovan narrated his qualifications [Tr. pp. 163-178]; Dr. Downes so testified [Tr. p. 299]; Dr. Burdick so testified [Tr. p. 344]; and Dr. Beekman so testified [Tr. p. 388]. Prior to this operation Dr. Donovan had performed eighteen similar operations, for fourteen of which he had made no charge. He had charged \$1,000.00 for one case, \$2,500.00 for another, \$350.00 for another, and \$250.00 for the other [Tr. pp. 253-254]. His gross annual earnings for the year 1939, including the \$2,500.00 paid by Mr. Jeffcott, were \$40,887.05 [Tr. p. 262].

At first it was planned to take the baby, a physician and a nurse to New York, but upon Mr. Jeffcott's suggestion, Dr. Donovan was called again and he consented to come to Tucson for the operation [Tr. pp. 483-487]. Dr. Thompson asked Mr. Jeffcott if money or expense was any object and Mr. Jeffcott testified [Tr. p. 88] that it should not cost much more to have the doctor come to Tucson than to take the doctor, baby, nurse and paraphernalia to New York [Tr. p. 88]. Dr. Thompson testified [Tr. p. 134] that when he asked Mr. Jeffcott if money was any object, that his response was simply "no". Dr. Donovan testified [Tr. p. 180] that he was contacted on Saturday, April 1st, 1939, while in Atlantic City, New Jersey, on vacation. He agreed, after the second telephone call, to fly to Tucson, Arizona, leaving Saturday night from Newark, New Jersey. He left Newark at 6:10 Saturday evening, April 1st, arriving in Tucson, Arizona, at 6:30 Sunday morning, April 2nd. Upon his arrival he consulted with the attending doctors and arranged for the operation [Tr. pp. 183-

184]. He operated the baby Sunday morning, performing an operation for intestinal obstruction which is described in detail [Tr. pp. 185-190]. The operation was successful and Dr. Donovan remained in Tucson until Monday morning, leaving at approximately 11:00 o'clock a. m. April 3rd [Tr. p. 215]. He arrived back in New York at approximately noon Tuesday, April 4th. Thereafter Dr. Donovan received several letters from Dr. Thompson and discussed the patient's condition on several occasions by telephone when a fecal fistula developed [Tr. pp. 141-142]. This condition existed for some time and Dr. Thompson and Dr. Carrell remained in attendance upon the baby for several months [Tr. pp. 142-143]. The baby was kept in the hospital for approximately six weeks after the operation [Tr. p. 461] and after he was taken home the fistula was still draining and continued for between eight months and a year after the operation. A ventral hernia developed, which exists at the present time [Tr. pp. 461-462] and which will necessitate another operation.

Mr. Jeffcott and Dr. Donovan did not discuss the amount of his charges while Dr. Donovan was in Tucson. Mr. Jeffcott testified [Tr. p. 93] that he had no opportunity to do so prior to the operation, or immediately thereafter, and being required to leave Sunday evening, he expected to return Monday and discuss the matter with Dr. Donovan, who originally planned to leave in the afternoon, and upon his return found that Dr. Donovan had departed. Dr. Donovan testified [Tr. p. 222] that he did not feel it his place to approach Mr. Jeffcott about his fee. On May 1st, 1939, Dr. Donovan mailed his statement for \$12,500.00 to Mr. Jeffcott [Tr. p. 8, Pltfs. Exh. No. 1].

On May 22nd, 1939, Mr. Jeffcott wrote a letter to Dr. Donovan expressing appreciation for his services, narrating generally his financial circumstances, and requesting a reconsideration of the amount of charge [Tr. p. 8, Pltfs. Exh. No. 2]. On August 14th, 1939, Mr. Jeffcott wrote Dr. Donovan stating that his offer to reduce his bill to \$7,500.00 was just as impossible for Mr. Jeffcott to pay as was the original figure [Tr. p. 11, Pltfs. Exh. No. 3]. He stated that \$2,500.00 was the highest figure that any member of the profession in Tucson had considered as being reasonable and enclosed his check therein in the sum of \$2,500.00 [Tr. p. 13, Pltfs. Exh. No. 3]. Further correspondence ensued without settlement being effected [Tr. p. 14, Pltfs. Exh. No. 4; Tr. p. 16, Pltfs. Exh. No. 5]. Dr. Donovan's expenses were between \$300.00 and \$350.00 [Tr. p. 251].

Suit was thereafter instituted by the plaintiff in the District Court of the United States for the District of Arizona, on the 11th day of September, 1940.

Specifications of Errors.

I.

The court erred in its finding of fact No. XXVIII in that it infers a legal obligation on the part of the parents of the defendant, David C. Jeffcott, to advance money and to pay for the services rendered by the plaintiff, which finding is not supported by the evidence and is in conflict therewith. That said finding is also erroneous and misleading in that it sets out in a lump sum the receipts and disbursements over a period of approximately five years which does not show the true financial condition of the parties on the date when the services were rendered by the

plaintiff. Said finding is also erroneous and misleading in that it sets forth a lump sum of personal expenditures without indicating that a portion of said expenditures was for initial ranch expense and also over \$6,000.00 for expenses incurred in connection with the illness of the minor son who was operated on by the plaintiff, and said sum also includes \$2,500.00 which was paid to the plaintiff.

II.

The court erred in its finding of fact No. XXXI in that the determination of a reasonable fee in the sum of \$7,500.00 was contrary to law and the evidence adduced at the trial, was excessive and unreasonable for the following reasons:

(a) That the fee was disproportionate to other fees charged and collected for similar services performed by the plaintiff.

(b) That the fee was disproportionate to the annual income of the plaintiff and represents an excessive charge for the services rendered.

(c) That the fee is excessive and unreasonable in view of the financial ability of the defendants to pay.

(d) That the fee was determined upon an assumption by the court that the defendants' parents were financially obligated to pay said fee.

III.

The court erred in its conclusion of law No. 4 in that the court's conclusion that the sum of \$7,500.00 was a reasonable fee for plaintiff's services, was erroneous in that such conclusion was contrary to the law and the evidence adduced at the trial of said cause, was excessive and unreasonable for the reasons stated above in support of point No. II.

IV.

That the judgment of the court made and entered on the 11th day of April, 1942, was not sustained by the law or the evidence adduced at the trial of said cause, was unreasonable and excessive for the reasons stated in support of points Nos. II and III herein.

V.

The court erred in permitting Dr. William A. Downes, a witness for the appellee, to express an opinion as to a reasonable fee for the services rendered by Dr. Edward J. Donovan in response to a hypothetical question propounded by Dr. Donovan's attorney, said hypothetical question being set forth beginning on page 315, transcript, and being concluded on page 326, transcript. The question contained a statement of the doctor's qualifications, the facts surrounding his employment, the operation performed, the results of the operation, but excluded any reference to or evidence of the financial ability of the patient, or those responsible, to pay for such operation. The witness was permitted to answer over the following objections [Tr. pp. 312-315]:

"Mr. Robertson: Now, if the court please: I object to the question, first because the foundation for the expression of any opinion by this witness has not been established, and, in fact, his own testimony shows that he has no ability to enable him to express an opinion as to a fee in 1939; and for the second reason that it singles out specialists and the fee they are entitled to charge, whereas the law on the subject is that it is only the reasonable charge that is to be made by any surgeon, and the fact that he may be one of the top men, or a specialist in a particular type of surgery is not to be taken into consideration

in the expression of an opinion by any member of the profession, and for the reason that it incorporates facts not in the record.

The Court: Will you indicate what facts that are incorporated in this preliminary question that are not in the record in the case?

Mr. Robertson: Just a second. No, I withdraw that, Your Honor. Did you understand me? I said I withdraw that. But as an additional objection, it excludes from the testimony of this witness in stating his opinion, the element of the ability of the patient to pay. No place is that expressed as one of the considerations he is to take into consideration in expressing an opinion, and the law is that it must be considered in expressing an opinion.

The Court: The same question was presented here when Dr. Thompson was on the stand.

Mr. Robertson: Yes, sir.

The Court: And the court ruled, sustained the objection to the question, that the element was not in it.

Mr. Robertson: I want to give you a chance to change your mind.

The Court: I think I will be consistent, at least. I want to say this to counsel: I have in a hasty way examined these depositions, and if I have read them correctly, the hypothetical question is practically the same. I think there is one sentence that is different. The question propounded is a lengthy one, and I presume counsel will have occasion to point out to the court the objections that may be raised to this question. I would not want to be hasty in ruling. If there is some question now that has not had the consideration of the court, I would hear counsel and rule further on that.

Mr. Robertson: I believe, Your Honor, that at the conclusion of one of these depositions, by some kind of stipulation or agreement as to objections I will have to voice to the material part of the other two depositions, that we can dispense with the ruling on them. I do not believe that the opinions of these doctors are admissible, first, because they show that they have no knowledge of any general fee schedule or any general system. They all admit that the ability of the patient to pay in New York is considered as one of the elements, but the hypothetical question that was propounded to them, and upon which they expressed an opinion, does not contain that element, and I do not, therefore, believe the depositions, except for the qualifying parts, are admissible in any sense of the word.

The Court: Now, as I indicated to counsel during the morning session, I have read these three depositions through, and I do not see the occasion of going through the depositions again now. They are here subject to the objections that are made, or that counsel desires to make to them, and as to the rulings on these depositions, it seems to me that these are matters that the court can rule upon in the final conclusion of the case. I do not see the occasion for going through the depositions again now, and the counsel can, at the proper time, furnish the court with a memorandum brief on the particular points they desire to raise on the depositions.

Mr. Allen: In other words, the court's ruling is reserved and counsel will be permitted to submit a memorandum to the court on the admissibility.

The Court: Your objections are in the record, and the court will then have an opportunity to rule on them, when the case is all through.

Mr. Robertson: Yes, sir.

Mr. Allen: The answer to that last question is 'Yes'.

It is stipulated by and between counsel for the respective parties that the following questions, and objections, being that part of the deposition of William A. Downes, a witness on behalf of the plaintiff, not read into the record at the time of the trial of this case, and the depositions of Carl G. Burdick and Fenwick Beekman, witnesses on behalf of plaintiff, and taken at the instance of the plaintiff, before Albert Gerber, a notary public, on the dates hereinafter and heretofore mentioned, are herewith incorporated into the transcript of testimony and, pursuant to this stipulation, are to be considered as though read and objections made at the trial of this case."

(Hypothetical question then propounded and answer made [Tr. p. 326]. Defendants' objections were overruled by order of court [Tr. p. 24].)

VI.

That the court erred in permitting Dr. Carl G. Burdick, a witness for the appellee, to express an opinion as to a reasonable fee to be paid Dr. Edward J. Donovan for services rendered over defendants' objections (being the same as were made to the hypothetical question propounded to Dr. William A. Downes and set forth in Specification of Error No. V above), the hypothetical question being the same as was propounded to Dr. Downes and is set forth beginning on page 349, transcript, and ending on page 359, transcript. The answer of the witness, after additional objections, is set forth on page 360,

transcript. This hypothetical question likewise contained no facts showing or tending to show the financial ability of the patient, or those responsible, to pay for such services.

VII.

The court erred in permitting Dr. Fenwick Beekman, a witness for the appellee, to express an opinion as to a reasonable fee to be paid Dr. Edward J. Donovan for services rendered over defendants' objections (being the same as were made to the hypothetical question propounded to Dr. William A. Downes and set forth in Specification of Error No. V above), the hypothetical question being the same as was propounded to Dr. Downes and is set forth beginning on page 393, transcript, and ending on page 404, transcript. The answer of the witness, after additional objections, is set forth on page 404, transcript. This hypothetical question likewise contained no facts showing or tending to show the financial ability of the patient, or those responsible, to pay for such services.

VIII.

The court erred in admitting evidence of the financial condition of the parents of the appellant, David C. Jeffcott, who were in no way obligated to pay for the professional services rendered to the appellants, which evidence was highly prejudicial to the appellants, such evidence and objections thereto being as follows, to-wit [Tr. pp. 99-102]:

“Q. How many children in all do you have? A. We now have three, sir.

Q. The first two were girls? A. Correct, sir.

Q. And this is—What is your father's name?

A. My father's name is Robert Crawford Jeffcott.

Q. And this son of yours, Robert Crawford Jeffcott, is your father's first grandson, isn't that correct? A. Yes, sir.

Q. And your father, Robert Crawford Jeffcott, was extremely interested in that son of yours at the time he was born?

Mr. Robertson: I object to the grandfather—

Mr. Allen: The child was named for him.

Mr. Robertson: I happen to have one named for me, too. The grandfather is not a party to this litigation.

The Court: Unless you make a showing as to the materiality, it is not admissible.

Mr. Allen: It is a foundational question leading up to the consideration of the wealth of the Jeffcott family and the importance of this male son in the light thereof, and there seems to be no question but that the seriousness of the operation is a matter that can be taken into account in determining the cost of an operation, just as it seems to be the better line, and now almost universally recognized line of authority that the financial ability or wealth of the parents themselves or the child may be taken into consideration, not only by the surgeon in determining his fee, but by the jury and court.

The Court: I understand that principle but this seems to be a remote situation, so far as the grandfather is concerned.

Mr. Allen: So far as the responsibility placed upon the surgeon in performing this operation, I think he is entitled to bring out any particular aspect which would place an out-of-the-ordinary responsibility as to the particular infant, and that is the theory on which it is offered. It is offered to show that this

particular infant was of outstanding importance and consequently the operation upon him would result in a larger degree the feeling of responsibility upon the surgeon. In other words, it is one of the elements that shows or tends to show the relation between these parties in this employment, and the very nature of the employment. There is a great difference in operating on one infant and another, so far as the responsibility on that surgeon is concerned, because aside from the fact that every man is deemed to have a high degree of affection for and high degree of interest in his offspring, certainly there can be circumstances which make a particular child of outstanding importance to his parents.

Mr. Robertson: I think this child was just about as important to Mr. and Mrs. David C. Jeffcott as any child ever born, but I do not see how that could make this line of testimony material. It might cast a sentimental reflection upon the lawsuit, to say that the child was named for its grandfather. He is the only male grandchild, and for that reason he may perhaps be worth a little bit more to Mr. and Mrs. Jeffcott, but we are in a court of law now, determining what is a reasonable fee for the operation, and unless the grandparents, uncles or aunts or someone else has some financial responsibility for the payment of this fee of twelve thousand five hundred dollars, what their financial circumstances are is immaterial. It is solely a question of the financial ability of those who are responsible for the payment of the bill, and I join with Mr. Allen in saying that the modern trend of authorities is not only that you may inquire into the financial responsibility of the parents, but also of the doctor who performs the operation, and I renew my objection to the question.

The Court: I shall permit the question to be answered and reserve the ruling as to the admissibility.

The Reporter: (Reading)

Q. And your father, Robert Crawford Jeffcott, was extremely interested in that son of yours at the time he was born? A. I am not quite clear on my dates, but unless I am mistaken, my father was in New York—pardon me—New Jersey, for some little time before the baby was born and after he was born. I presume he felt the normal reactions of any grandfather."

[Tr. pp. 106-109]:

"Q. Now, to go back a moment, Mr. Jeffcott, to the question of the importance of your son in the Jeffcott family, it is a fact, is it not, that your father, Robert Crawford Jeffcott, is an extremely wealthy man?

Mr. Robertson: I object to that question and object to a question being asked in a court where Mr. Allen very well knows that unless the grandfather of this baby, in some written obligation, has agreed to pay for this operation, he is under no financial responsibility for it, and is certainly not admissible in this lawsuit. He knows that the other doctor, Dr. Hugh Thompson, employed Dr. Donovan. I object to the question and would request the court to instruct counsel that any such line of inquiry is not proper in this action.

Mr. Allen: I again assert that we make no claim against Robert Crawford Jeffcott, senior, or the mother, but we maintain, as previously outlined to the court, that we have a right to go into the nature of the responsibility of this surgeon with regard to any peculiar or unusual importance that might have

been placed by the family upon this particular child, and this question is foundational as to the natural line of inheritance which would be expected to follow in this family. That is the purpose of it.

Mr. Robertson: The very fact it might be the natural line of inheritance unfortunately does not guarantee to Mr. Dave Jeffcott that he will inherit any of such money.

The Court: I suppose the importance to the plaintiff in this case of this testimony is the importance of this child to the parents.

Mr. Robertson: The parents are the only defendants in the action, and we must confine the evidence that is introduced in this case to the parties that are in this case.

The Court: Let the question be answered and the court will reserve the ruling. If this seems to the court remote and should not be considered, the court will disregard it altogether. The question may be answered with the understanding that the ruling is reserved.

The Reporter (reading):

Q. Now, to go back a moment, Mr. Jeffcott, to the question of the importance of your son in the Jeffcott family, it is a fact, is it not, that your father, Robert Crawford Jeffcott, is an extremely wealthy man? A. I have done quite a lot of work with figures in my life and had I ever seen any figures on my father's wealth or lack of wealth, I would be able to answer that question, but truly I do not know what his wealth consists of. I have never been taken into his confidence, nor to my knowledge has anybody else, as to what he has, has had, or will have, or has now.

Mr. Allen:

Q. Nevertheless, you regard him as a man of very substantial means, do you not? A. I have lived in the family quite a while and I know it has always been told to me how hard times were, and we have been instructed to be thrifty.

Q. Answer the question. Do you or do you not regard your father as a man of substantial means?

Mr. Robertson: Mr. Allen is adopting the same terms we find in the complaint. He says 'a man of substantial means'. In the complaint he says 'a reasonable fee of twelve thousand five hundred dollars'. What is 'reasonable'? What is 'substantial'? What might be a whale of a lot to someone else might be a 'reasonable' fee to another.

The Court: Answer the question.

A. Sir, I find it exceedingly difficult to answer that question, because what does constitute reasonable wealth? If somebody said to me a man has an annual income of a million dollars a year, I would understand that. I do not know what my father's income is. I know he has had things that have seemed to cost a lot of money, and I have also heard they were mortgaged heavily, and I don't know.

Mr. Allen:

Q. One of the things that seemed to cost a lot of money is a yacht upon which he employed a very extensive crew?

Mr. Robertson: May I have a continuing objection?

A. Yes, sir, I believe you are correct that on the face of it that appeared to be true.

Mr. Allen:

Q. And you would not say that those mansions he built down close to your ranch home are paid for with chicken feed, would you? A. No.

Q. He has a very substantial investment there, for a place to live, has he not? A. I do not know the cost of that. I could guess, but I do not know.

Q. What would be your guess? A. Anything from fifty thousand to two hundred thousand."

The admission of the foregoing testimony over appellants' objections was particularly prejudicial and erroneously admitted, as the foundation for its admissibility, as stated by counsel [Tr. p. 100], was the "out of the ordinary responsibility" placed upon Dr. Donovan while performing the operation and which was denied by Dr. Donovan himself [Tr. p. 225]:

"Q. Had you found out anything about the financial condition of the parties before you performed the operation? A. No, sir.

Q. Did you know anything about the grandparents? A. No, sir.

Q. And, in fact, you did not know that this was the sole grandson until after the operation was performed? A. Before I performed the operation?

Q. Yes. A. No, sir, I did not. Excuse me just a moment. May I correct that. I will change that a little bit. Someone mentioned that fact during the consultation, but who it was, I cannot say.

Q. But that did not weigh down very heavily upon your mind in the responsibility you felt for the child? A. I would feel the same responsibility if I were going to operate on a child, whether he were the first or the tenth.

Q. I appreciate your honesty, doctor. Therefore, that part of the responsibility constitutes no part of the foundation for your charge, whether he is the sole grandson, and his grandparents are worth a million or a thousand or nothing? A. No, sir; no, sir."

IX.

That the court erred in denying appellants' motion for new trial and in refusing to modify its findings of fact and conclusions of law and to reduce the amount of judgment entered therein for the reasons that the judgment was not justified by the evidence, was contrary to such evidence and to the law, and was grossly excessive; that the court had erred in admitting the evidence of Drs. Downes, Burdick and Beekman, set forth in Nos. V, VI and VII above, and the evidence pertaining to the financial condition of the parents of the appellants, as set forth in No. VIII above.

Argument.

It is difficult for the appellants to summarize this case and likewise our argument must be sketchy. To be blunt, our principal ground of appeal is that the court awarded too much money to the plaintiff for the services rendered in view of all circumstances and conditions. It is necessary that the entire evidence be read and considered by the court in that in determining what was reasonable compensation, all circumstances and conditions must be considered. The trial lasted four and one-half days and we cannot summarize all this testimony in the limited space provided for by the court rules. We will endeavor, however, to concisely set forth the high lights upon which we feel a new trial should be ordered, or a substantial reduction of the judgment decreed by the appellate court.

This case is rather novel from the standpoint of the limited legal questions under dispute. There was no dispute at the trial as to the admissibility of evidence of the ability of the patient to pay. Counsel for the appellee

admitted this principle [Tr. p. 100]. Counsel for the appellants admitted this proposition [Tr. p. 101]. Cases sustaining this modern rule are:

Citron v. Fields (1938), 85 Pac. (2d) 535, 30 Cal. App. (2d) 51;

Zumwalt v. Schwarz (1931), 112 Cal. App. 734, 297 Pac. 608;

Mount v. Reicher (1932), 140 Ore. 267, 13 Pac. (2d) 335;

Gilpi v. Wilbert (1929), 119 So. 455, 9 La. App. 170;

Pfeiffer v. Dyer (1929), 145 Atl. 284, 295 Pa. 306;

Houda v. McDonald (1930), 294 Pac. 249, 159 Wash. 561;

Young Bros. v. Succession of Von Schoeler (1922), 91 So. 551, 151 La. 73.

The only legal question upon which there is a substantial difference of opinion will be considered under Specifications of Error Nos. V, VI and VII where expert witnesses were permitted to testify under specific objection and to give their opinions as to a reasonable fee based upon a hypothetical question, which hypothetical question contained no facts showing, or tending to show the financial ability of the patient, or those responsible, to pay for such services. The examination of all of these experts disclosed that in determining a reasonable fee they all considered, as one of the important elements, the ability of the patient to pay.

I.

Specification of Error No. I relates to finding of fact No. XXVIII. The court made the following finding therein: "That one or both of the said parents promised to assist the said David C. Jeffcott financially in getting started in the cattle ranching business." Throughout the transcript of testimony it will be seen that the court seemed to consider this as being "a source of income" for said David C. Jeffcott and placed undue emphasis upon the fact that Mr. Jeffcott was able to borrow money from his parents to cover the expenses of developing and stocking his ranch, and also to defray personal living expenses until the ranch was on a profit earning basis, notwithstanding the fact that all money borrowed was done so under an express agreement that a real estate and chattel mortgage would be executed when the total amount necessary had been determined and that such real estate and chattel mortgage was executed providing for the payment of interest, amortization of principal and partial releases when sales were made. We feel it is apparent that the court was influenced by the financial condition and circumstances of Mr. Jeffcott's parents, which evidence was admitted over the objection of the appellants upon a premise and for a reason which did not exist as was subsequently brought out in the testimony of the appellee himself. This is more fully discussed under Specification of Error No. VIII.

Finding of fact No. XXVIII also sets forth in lump sum totals the amounts expended over a five-year period and the amounts earned by the appellants during the same period which casts an inaccurate and prejudicial appearance on the financial condition of the appellants on

the date when the appellee rendered his services. The court also sets forth in a lump sum the personal expenditures of the appellants over this five-year period without showing that a substantial portion of these expenditures were made necessary by the payment of income taxes when the stocks and bonds, which had been previously given him by his father, were liquidated. Initial expenses were also included, which were really ranch expenses, but were contained in his designation of "personal expenses" as proper books had not been set up at that time. Also contained in this lump sum figure was \$2500.00 which the appellants had paid to the appellee and over \$3500.00 for other expenses incurred in connection with the illness of the minor son who was operated by the appellee. This finding of fact, in our opinion, illustrates the attitude of the court which was created by the admission of evidence of the financial condition of the appellants' parents and improperly states the financial circumstances of the appellants.

II.

We will consider Specifications of Error Nos. II, III, and IV at one time as they are all interlocking.

The basic point in this appeal is raised under these specifications of error, to-wit, the awarding of the court was excessive and unreasonable for the following reasons:

(a) The total fee of \$7,500.00, with a credit of \$2,500.00 was disproportionate to other fees charged and collected by the appellee for similar operations. He testified that he had performed eighteen such operations (Finding of Fact XXX), [Tr. p. 53], for fourteen of which he received nothing as they were presumably charity

cases. For one he received \$250.00, for one \$350.00, for one \$1,000.00, and for the other \$2,500.00. In his testimony he shows no justification for making a charge of \$12,500.00 for this operation, nor does he show any justification for the award of the court reducing his fee to a total of \$7,500.00. He was gone from his New York office only from Saturday evening, April 1st, 1939, until Tuesday afternoon, April 4th, 1939. In one place he states that had the operation been performed in New York, he would have charged between \$3,500.00 and \$5,000.00 [Tr. p. 227].

Later on [Tr. pp. 233-235], he suggested that he might have charged \$5,000.00. He attributed \$5,000.00 of his charge to the hazards of his flight by American Airlines from Newark, New Jersey, to Tucson, Arizona [Tr. p. 228]. He knew of no business that he lost on account of absence from his office [Tr. p. 230].

(b) The fee charged and the reduced fee allowed by the court is disproportionate to the annual income of the plaintiff as his total gross income for the year of 1939, including the \$2,500.00 paid by Mr. Jeffcott, was \$40,887.05 [Tr. p. 262]. His net income was, roughly, \$30,000.00 [Tr. p. 263]. We submit that a fee to be awarded by the court of approximately one-fourth of his entire annual income for one operation and a trip by plane to Tucson, Arizona, from New York, which kept him away from his office actually for only one and one-half working days, is an exorbitant and excessive award.

(c) That the fee is excessive and unreasonable in view of the financial ability of the appellants to pay. The court finds, in Finding of Fact No. XXVIII, that at the time of the employment of the appellee, the appellants

were worth approximately \$80,000.00 net, the ranch being valued at approximately \$150,000.00, and subject to an indebtedness of approximately \$70,000.00. The appellants had no net income at that time, although voluntarily they went ahead to show that by 1942 they should have an annual income of between \$5,000.00 and \$8,000.00 (before payment of income taxes) [Tr. p. 52]. It is a matter of common knowledge, and such practice was testified to by the experts called by the appellants, that outstanding surgeons usually make a charge for a major operation of approximately one-tenth of a person's annual income, or one month's income. Dr. Carrell so testified [Tr. p. 475]; Dr. Gore so testified [Tr. p. 492]; and Dr. Holbrook so testified [Tr. p. 515]. All of these experts, however, conceded that an additional fee should be allowed where a surgeon is called from New York to Arizona. Dr. Holbrook fixed a fee of \$2,000.00 [Tr. p. 530]; Dr. Gore fixed a maximum fee of between \$1,500.00 and \$2,000.00 [Tr. p. 507]; and Dr. Carrell fixed a maximum fee of \$2,000.00, plus expenses [Tr. p. 474].

An examination of the qualifications of these three experts will disclose that they compare very favorably with those of Dr. Donovan and in view of the fact that all three of these doctors practice in Tucson, Arizona, which is a recognized health resort, they have a much better opportunity of knowing the fee and practices of outstanding physicians and surgeons all over the country than would a doctor whose practice is confined to New York City.

(d) We feel it is evident from the size of the fee awarded that the trial court was influenced by testimony

which was erroneously admitted as to the financial condition of defendants' parents. A reading of the transcript of testimony will show that the court's attitude was completely reversed from and after the time when this testimony came into the trial. It is difficult to point out this assertion by specific examples, as the cold, written text of the transcript of testimony cannot portray the tone of voice and attitude of the court. Some indication of this, however, is given in the way the court ruled upon various objections made by the defendants' counsel and comments in the course of such rulings. We will attempt to point out in oral argument a number of these instances, and although each isolated ruling by the court, or statement by the court, in our opinion, did not constitute reversible error, the cumulative effect of such rulings can lead but to the conclusion that the court was prejudiced by this evidence. At no place in the transcript of testimony is there any evidence that the relationship between the father and mother and the son was other than one of a strict businesslike nature, and there is certainly no testimony or evidence in the case which even tends to show that the parents assumed any financial responsibility for the payment of this fee, or will in any way aid or assist the defendants in paying it. Such is not the case.

A typical example of this attitude is set forth on page 450, transcript, and reads as follows:

"The Court: This relationship between the witness, the defendant in this case, and the one to whom this indebtedness is due is before the court. How much further can you go in this matter, Mr. Allen? The relationship between this defendant and the man to whom this indebtedness, this sum, is due for ad-

vances on the mortgage, is the relationship of father and son, isn't that all?

Mr. Allen: I withdraw the question in order to save time in the matter.

The Court: I do not see the necessity of going into the ramifications. The implication is apparent as to the relationship and the establishment of the indebtedness. If there is some other purpose, all right."

The court's statement: "The implication is apparent as to the relationship and establishment of the indebtedness" clearly demonstrates that the court had fallen a victim to the insidious and undisclosed intention of the appellee in having previously secured admission of this evidence for a reason which was later denied by Dr. Donovan. It is another illustration of the fallacy that a court admits evidence and if it subsequently finds it not material, that it can disregard it. The trial court is still a human being and can not "unring a bell".

III.

The appellee offered the testimony of Drs. William A. Downes, Carl G. Burdick and Fenwick Beekman by deposition, covered by Specifications of Error Nos. V, VI and VII. The court interrupted the reading of these depositions into the record [Tr. p. 313]. By stipulation [Tr. p. 79], it was agreed that the reporter in preparing the transcript of testimony might insert the balance of the testimony of all three doctors and all objections therein contained, and it was further stipulated that all objections made by attorney for the defendants to the portion of the deposition which had been read would be considered as having been made to the remaining portions of

said depositions insofar as the same might be applicable. A reading of these depositions will show that each of these witnesses expressed an opinion based upon a long hypothetical question which contained no facts showing, or any reference to the financial ability of the appellants to pay a fee, although each of these experts readily admitted that one of the most important considerations in determining a fee is the ability of the patient to pay [Tr. p. 330—William A. Downes]:

“XQ. 105. What factors would you take into consideration in estimating the fairness of another surgeon’s charge? A. To begin with, it would depend entirely upon the ability to pay and the social standing of the individual.

XQ. 106. And the skill of the surgeon would be of secondary consideration? A. We assume that the surgeon is skillful.

XQ. 107. And a doctor need not be what I would call in the vernacular ‘a top flight surgeon’ in order to perform a skillful operation, need he? A. No.”

We feel that the hypothetical question submitted to these doctors and their answers is a perfect example of this ridiculous practice in our courts. A question encompassing ten pages is submitted to a doctor. He has either been thoroughly prepared prior to the submission of such a question, or his answer is well known, regardless of what may be contained in the question. An answer is then given which is a surprise to no one. The question propounded is “padded to the queen’s taste” (quoting Dr. Burdick), and then the opposing attorney is supposed to break down this opinion.

The worst feature about permitting these three experts to answer this hypothetical question and express an opinion as to what would be a reasonable fee, where the question contained no facts as to the financial condition of the appellants, is the fact that their answers were the ultimate issues to be found by the court. The authorities hold this to be particularly improper. As a general rule all material facts must be contained in a hypothetical question unless there is a dispute as to certain issues before an expert is to be permitted to testify. When it calls for an answer on the ultimate issue of the case, this must be done.

Jones on Evidence, 4th Ed., Vol. 2, Sec. 371, page 694, Note 17;

22 C. J. 711;

DeDonato v. Wells (1931), 328 Mo. 448, 41 S. W. (2d) 184, 82 A. L. R. 1331;

Hahn v. Hammerstein (1917), 272 Mo. 248 (at 262), 198 S. W. 833.

All of these doctors admitted the importance of knowledge of the financial ability of the patient to pay in fixing a fee, yet they answered a question which ignored this important issue. Of what earthly good is this testimony to the court other than to place in the court's mind the fact that three prominent New York doctors thought that Dr. Donovan should receive a fee in excess of \$10,000.00? Certainly these doctors would not have been called to testify unless Dr. Donovan's attorney knew this in advance. We feel the admission of this testimony was highly improper and prejudicial and added its cumulative weight to the court's mind which resulted in an award of compen-

sation of \$7,500.00 for one operation, a few subsequent consultations, and an absence from New York of some sixty hours.

IV.

Specification of Error No. VIII speaks for itself. It is hard to believe that counsel for the appellee had not discussed this case with Dr. Donovan before commencing the trial. His thorough comprehension of the medical aspects of the case, the length and completeness of the hypothetical question, and his general knowledge of the facts of the case amply demonstrated hours of work in preparation. We therefore say it is hard to believe that he had neglected to ask Dr. Donovan whether or not he knew that Robert C. Jeffcott was the only grandson, that his grandfather was extremely wealthy, and that the grandfather was extremely interested in said grandson before Dr. Donovan performed the operation. Notwithstanding our belief that counsel had inquired of Dr. Donovan concerning these matters, and notwithstanding the fact that Dr. Donovan was sitting beside him, counsel stated that his purpose in attempting to bring out the financial condition of the grandfather, and the fact that the baby was a highly desired grandson, was to show the added "out of the ordinary" responsibility placed upon the shoulders of Dr. Donovan when performing this particular operation. If counsel had not inquired of these facts when he stated to the court that this was his purpose, Dr. Donovan should have communicated to his counsel the fact that these matters were not known by him prior to his performing the operation and even had they been, they would not have added to his feeling of responsibility, as he finally testified [Tr. p. 225]. The court stated to plaintiff's counsel [Tr. p. 100]: "Unless you make a showing as

to the materiality, it is not admissible.” This showing and purpose was made, the testimony admitted, and then the purpose failed. Its effect upon the court was not, however, erased. We feel that a new trial should be awarded, or preferably a substantial reduction made by this court for this reason alone. We feel it is apparent, from a consideration of the entire testimony, that Dr. Donovan’s charge was made with the thought in mind that the grandfather would pay it, after he learned that the grandfather was a man of wealth, and we feel that the trial court was led to this state of mind by the improper admission of this evidence. Such is not the case and a judgment of a court of law should not be predicated upon matters and things improperly in the record which can form no part of a proper consideration of the case.

In this connection we wish to cite to the court a few cases which show comparative fees that have been awarded. Unfortunately, there are not many illustrative cases, but those that are found show the charges in this case to be exorbitant.

In *O’Ferrell v. National Bridge Co.* (1928), 165 La. 963, 116 So. 399, a fee of \$6,500.00 was held to be not excessive for medical services covering a period of several months to a group of seven men who were seriously injured when they fell from a bridge being constructed by the defendant.

In *Succession of Munch* (1928), 167 La. 48, 118 So. 688, a fee of \$2,500.00 was approved in a claim against the estate of a deceased who died leaving a net estate of \$250,000.00, for services covering a thirty-day period and two major operations.

An instance of an opposite extreme is found in the case of *Eddy v. Healey* (1918), 209 Ill. App. 270 (no Re-

porter's citation available), where a fee of \$100.00 was approved for a very delicate throat operation and considerable post-operative attention.

We feel that a calm and deliberate consideration of the evidence in this case will lead this court to the conclusion that the trial court was influenced by evidence which was improperly admitted into the record, and that its award was unreasonable and excessive, and that either a substantial reduction should be ordered by this court to avoid additional delay, work and expense for all parties involved, or in the alternative, award a new trial with instructions.

We respectfully request the right to orally argue this matter before the court at such time and place as may be fixed.

Respectfully submitted,

DARNELL & ROBERTSON,

Attorneys for Appellants.

No. 10251

IN THE

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United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

DAVID C. JEFFCOTT and ELSIE JEFFCOT, his wife,
Appellants,

vs.

EDWARD J. DONOVAN,
Appellee.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE DISTRICT OF ARIZONA.

BRIEF OF APPELLEE.

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37 North Church Street, Tuscon, Arizona,
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FILED

DEC 2 - 1942

PAUL P. O'BRIEN,
CLERK

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BRIEF OF APPELLEE.

Jurisdiction.

The statement of appellants, appearing on pages 1, 2 and 3 of their opening brief, is an accurate statement of the pleadings and facts upon which rested the jurisdiction of the District Court of Arizona, and of this Court upon this appeal.

Statement of the Case.

The statement of the case, as prepared by appellants and submitted in their opening brief, is substantially in accord with the evidence, but should be supplemented or clarified in some respects, in order that a narrative statement of the case be fairly and completely submitted to this Court.

Appellants' statement is supported by the evidence and is fairly inclusive of the pertinent material down to the

second paragraph beginning on page 6 of such opening brief.

The material submitted in appellants' statement, from about the middle of page 6 to the end of such statement, should be considered in light of certain additional facts of the case, if this Court is to have a fair and unbiased understanding of the situation below it.

It was not only first planned that the Jeffcott baby should be flown to New York for the needed operation, but all arrangements were made with Dr. Donovan to the end that he would see the baby in New York City on the following day, at Babies' Hospital, and that he would operate there [Tr. pp. 132-133].

About an hour later [Tr. p. 89] and having decided that to have the surgeon come to Tucson and there perform the operation would disturb the orderly routine of fewer people [Tr. p. 47] and that it should not cost substantially more to have the surgeon come to Tucson than to take the baby, with necessary attendants, to New York [Tr. pp. 86-87], the Jeffcotts instructed Dr. Thompson to again get in touch with Dr. Donovan by long distance and to prevail upon him to come to Tucson at once, there to perform the needed operation [Tr. pp. 46-47].

Up to such point in such negotiations, Mr. Jeffcott had made no effort to determine what Dr. Donovan would charge for such trip and the proposed operation [Tr. p. 132]. No such effort was made thereafter [Tr. pp. 93-94].

Before complying with Mr. Jeffcott's instructions, Dr. Thompson voiced some doubt that Dr. Donovan would see fit to make the trip to Tucson and asked Mr. Jeffcott whether money was any object in making such arrange-

ments [Tr. p. 134]. Dr. Thompson not only testified, as stated by appellants, that Mr. Jeffcott's reply was simply the one word, "No" [Tr. p. 161], but Mr. Jeffcott admitted, on cross-examination [Tr. pp. 87-88], that he could have been mistaken in his testimony, as to what he said in reply to Dr. Thompson's inquiry, and that his reply could have been simply "no."

The very pertinent fact omitted by appellants, in connection with such statement by Mr. Jeffcott, is that, when Dr. Donovan hesitated to decide to make the trip to Tucson, Dr. Thompson told him that the parents of the child, these appellants, had stated that money was no object [Tr. pp. 134, 158, 206, 249-250, 287], which representation he relied upon, possibly in deciding to make the trip to Tucson and certainly in determining what his charge should be [Tr. pp. 182, 250].

No true understanding of this case can be had unless such representation to Dr. Donovan be taken into account.

Toward the end of the paragraph, ending on page 7 of appellants' opening brief, there is a statement concerning the development, existence and condition of a ventral hernia of the Jeffcott infant.

Such statement has no proper place in this case.

Mrs. Jeffcott testified [Tr. p. 462] that a ventral hernia developed and that it would require an operation.

The record is devoid of any testimony whatever, to show, or even to suggest, that the Jeffcott infant ever suffered an incisional hernia, which is the only type of

ventral hernia which could have any possible connection with the operation in question [Tr. p. 551].

The only medical opinion appearing in the record, such being certainly of more value than the lay opinion of Mrs. Jeffcott, is to the effect that no operation will be needed for correction of this hernia [Tr. pp. 551-553], even if it be an incisional hernia.

In view of the extended effort of appellants to avoid paying the fee of Dr. Donovan, it can only be assumed that they certainly would have shown this hernia to be incisional, were such possible.

Since there is absolutely no proof that it was an incisional hernia and since it is reasonable to assume that no such proof was possible, mention of the ventral hernia cannot be regarded as being subject matter which, in fairness, should have any proper place within appellants' statement of the case.

In the paragraph beginning on page 7 of such opening brief, appellants state that Mr. Jeffcott testified that he had no opportunity to discuss fee with Dr. Donovan prior to or immediately following the operation.

While it is correct that Mr. Jeffcott did so testify, there is evidence that Mr. Jeffcott made no inquiry concerning the cost of such trip and operation, prior to Dr. Donovan's departure for Tucson [Tr. pp. 93-94, 132], and Dr. Donovan testified that Mr. Jeffcott had ample opportunity to discuss the matter of fee with him at Tucson [Tr. pp. 245-247].

Argument.

Appellants have opened that portion of their brief which they entitle "Argument" with the indication that the principal basis for their appeal is their belief that the trial court awarded too much money to Dr. Donovan, the appellee, as the plaintiff below. (See App. Br. p. 21.)

Appellants indicate, in the introductory portion of their argument, that their prime hope for appellate relief in this case rests in the difficult proposition of prevailing upon this Court, upon its review of the cold and inanimate record, to assume that it is better qualified to determine the issues of fact than was the trial court, which had the opportunity to hear and observe the witnesses.

This proposition, which seems to be the meat of the position of appellants before this Court, will be discussed further herein, following an orderly discussion of the sundry propositions advanced by the brief of appellants.

Appellants, beginning on page 21 of their opening brief, state that counsel were in agreement, at trial, on the proposition that the modern trend of authority is away from the conflict which exists on the rule or theory that evidence is admissible to show financial ability of a patient to pay for the services of a physician or surgeon.

Such statement is correct and the authorities, cited by appellants on page 22 of their brief, may be taken to indicate such trend.

Appellants, however, cite no case, and none has been found by counsel for appellee, to hold or indicate that a physician or surgeon must prove the financial ability of a

patient to pay, in order to make out a *prima facie* case in an action of this class.

Appellee agrees that a physician and surgeon may consider ability of his patient to pay, in deciding what charge he should make, and may show such ability in an action brought to recover his fee, but appellee does not concede, to any extent, that such a litigant must show such ability, particularly in a case which involves a fact situation such as the one now before this Court.

The authorities, cited by appellants as mentioned above, do hold that ability to pay may be properly shown in actions similar to this.

Such authorities, however, are practically ample authority, by themselves, to indicate the duty of this Court to affirm the judgment of the District Court, as appellee will point out in detail in the course of this brief.

I.

This division hereof is addressed to appellants' Specification of Error No. I [Tr. pp. 8-9] and to division No. I of their "Argument," appearing on pages 23 and 24 of their opening brief.

Such Specification No. I contains three separate and distinct assignments of error, all concerning Finding XXVIII, made by the trial court.

The first of such assignments is that such finding infers a legal obligation, on the part of the parents of David C. Jeffcott to advance money and to pay for the services of Dr. Donovan.

It is difficult, indeed, to discover, within Finding XXVIII, any justification for such contention on the part of appellants.

The transcript of testimony is full of indications that the Jeffcotts defended this action upon the novel and wholly untenable theory that they should be relieved from responsibility to Dr. Donovan upon showing that they were without "net annual income."

Appellants defended this action upon the fallacy that having ability to pay and having net income are synonymous.

Their defense involves only these propositions, namely: (1) that their ability to pay should be measured only in terms of annual income; (2) that Dr. Donovan was obligated to determine his fee on the basis of taking a percentage of their net annual income; and (3) that, since they had no net annual income at the time the operation was performed, Dr. Donovan had no right to any fee beyond that sum which they had paid him in order to "free our consciences," as Mr. Jeffcott put the proposition [Tr. p. 13].

The appellants defended this action on the highly unreasonable theory that they might be worth a million, but that they would be without ability to pay, in the eyes of the law, just so long as such wealth was used in some manner which would not produce for them some net annual income.

This defense theory is conclusively apparent throughout the entire testimony on behalf of the Jeffcotts.

Some of the particular instances are as follows:

The whole of Mr. Jeffcott's testimony concerning his worth and income [Tr. pp. 418-438];

The statements of his counsel [Tr. p. 434];

The cross-examination of Dr. Donovan [Tr. pp. 239-240, 242];

Defendants' Exhibit A [Tr. p. 23];

The hypothetical question propounded by appellants to Dr. Carrell [Tr. pp. 472-473]; and his testimony [Tr. pp. 474-475];

The testimony of Dr. Gore, as to his practice of determining a fee upon the basis of income [Tr. pp. 490-492]; and the hypothetical question propounded to him [Tr. pp. 493-495];

The hypothetical question propounded to Dr. Holbrook [Tr. pp. 522-526], with particular attention to page 526; and

Appellants' Requested Finding I [Tr. pp. 40-41].

The Court will observe, from such portions of the record, that the Jeffcotts adhered constantly to the theory that they were not liable to Dr. Donovan because of the fact that they had no net income at the time he operated upon and saved the life of their child.

Dr. Donovan, as plaintiff below, proved that the Jeffcotts, in negotiating his employment to leave his practice at New York and to fly to Tucson, there to operate on their infant son, represented that money was no object [Tr. p. 134; p. 47]; that Mr. Jeffcott at no time discussed the matter of fee with him [Tr. pp. 93-95; 245-246]; that there were no indications of concern on the part of the Jeffcotts about expense [Tr. p. 249]; and

that Mr. Jeffcott admitted the worth of the defendants to be approximately \$100,000.00 at or about the time of the operation [Tr. pp. 8-10].

Dr. Donovan then elected to rest his case, as to the point of the ability of the Jeffcotts to pay his fee.

The Jeffcotts then presented their defense on the point of their ability to pay, such defense being along the line previously mentioned and being indicated by the previous references to the record.

Following receipt of all of such testimony and documentary evidence, concerning ability to pay, the trial court was called upon to make findings of fact.

When a draft of proposed findings was prepared and submitted to the trial court, pursuant to its rules, the matter of such financial ability was covered by proposed findings, numbered XXIX and XXX [Tr. p. 33], to the effect that the Jeffcotts, at the time of employing Dr. Donovan, were of substantial worth and that, for the year 1939, during which the operation in question was performed, their personal expenditures exceeded fifteen thousand dollars.

The Jeffcotts thereupon objected to such proposed findings [Tr. pp. 37-38] and requested that the trial court, in lieu thereof, find substantially those ultimate conclusions which are found within Finding XXVIII [Tr. pp. 40-41; 51-52].

Appellants do not and could not complain as to the form of Finding XXVIII, since it is in substantially the form which they requested.

The substance of Finding XXVIII consists of a series of conclusions, drawn from and wholly supported by the testimony of Mr. Jeffcott [Tr. pp. 23; 418-438].

A reading of Finding XXVIII will clearly show that it contains nothing which is even suggestive of supporting appellants' specification of error, appearing on page 8 of their opening brief, that "it infers a legal obligation on the part of the parents of the defendant, David C. Jeffcott, to advance money and to pay for the services rendered by the plaintiff,".

Appellants have failed to refer to anything within the record, other than said Finding XXVIII, which they claim to support their contention in regard to such specification.

Appellants, on page 23 of their opening brief and referring to financial assistance which David C. Jeffcott was shown to have received from his father, make the following statement:

"Throughout the transcript of testimony it will be seen that the court seemed to consider this as a 'source of income' for said David C. Jeffcott and placed undue emphasis upon the fact that Mr. Jeffcott was able to borrow money from his parents
* * *."

This may only be regarded as a bare and unsupported statement by counsel, since not one reference is given to any portion of the transcript of testimony or to other parts of the record where such consideration or undue emphasis by the trial court may be found.

Appellee believes and submits that such statement is not supported by reference because such reference is impossible.

Appellants further argue, if their unsupported statement may be properly classed as argument, that Finding XXVIII "casts an inaccurate and prejudicial appearance on the financial condition of the appellants on the date when appellee rendered his services."

It is difficult to understand how such bare statement can prove to be of interest or aid to this Court.

Mr. Jeffcott's summary of financial totals, taken from his books [Tr. pp. 23; 429-430] and the whole of his testimony concerning his financial ability to pay [Tr. pp. 418-438] clearly support each and every finding included by the trial court within its said Finding XXVIII. The court merely found the conclusions, predicated wholly upon Mr. Jeffcott's testimony, as to the source and extent of his property holdings, as to the amount and nature of encumbrances thereon, as to the expenditures made by him, during the period of time covered in his testimony, for operation of his ranch and for what he classed and described as "personal expenditures", and as to the fact that, during such period of time, he had had no net income from his ranch property.

All of such conclusions of fact, clearly supported by such evidence, tend to indicate the state of financial ability of the Jeffcotts.

The casting of inaccurate and prejudicial appearance, mentioned by appellants, is not apparent.

Appellants also suggest, in subdivision I of their argument and on page 24 of their opening brief, that some

form of prejudicial error was committed by the trial court including in Finding XXVIII a statement of the approximate total of the personal expenditures of the Jeffcotts for the years 1938 to 1941, both included [Tr. pp. 23; 418-438].

The testimony of Mr. Jeffcott, above referred to, shows that his financial condition, without regard to net annual income from his business, during such four years, was such that he and his wife made personal expenditures in excess of forty thousand dollars.

The trial court included such ultimate fact within its findings.

The reason for such inclusion is obvious. The fact that a man and wife are in such financial condition as to permit them to make personal expenditures exceeding \$40,000.00 in four years, regardless of the source from which expended, tends strongly to indicate ability to pay. The ability to make such expenditures, as well as the spending, contributes materially and pointedly to the financial picture of the Jeffcotts. The purpose for which such expenditures were made could add nothing whatever to such picture.

Certainly, the trial court had the right to take into consideration all of the evidence introduced by the Jeffcotts concerning their financial condition. Certainly, the extent of their expenditures bears upon their ability to pay. How, then, can it be possible that they suffered any when, without detailing the nature of the expenditures, the Court found that their personal expenditures, as Mr. Jeffcott testified, exceeded forty thousand dollars?

II.

Specifications of Error, numbered II, III and IV [Tr. pp. 9-10] are that the finding, conclusion and judgment of the trial court, awarding to the plaintiff below the sum of \$7,500.00 less the \$2,500.00 paid by defendants below, were erroneous on the ground that the award was excessive and unreasonable.

Division II of appellants' *Argument*, pages 24-28 of the opening brief, and this division hereof are both devoted to the matters having to do with such Specifications of Error.

Appellants first advance the argument that the award was excessive and unreasonable because it was disproportionate to other fees charged by Dr. Donovan for similar operations.

In the first place, appellants overlook the fact that the record discloses that Dr. Donovan had never performed any operation for volvulus of the newborn which can be taken fairly to have been done under circumstances similar to those which prevailed in connection with the Jeffcott operation.

Dr. Donovan carried on his practice as a surgeon wholly in New York City, from his admission in 1921 to the performance of the operation in question [Tr. p. 164]. The eighteen operations for correction of volvulus of the newborn, mentioned by appellants, had been performed in New York City, where Dr. Donovan had his offices and his practice. When the Jeffcotts decided, to the end that the orderly routine of less people be disturbed [Tr. p. 47, Finding XIII] and by representing that money or expense was no object [Tr. p. 47, Finding XI], to prevail upon Dr. Donovan to come to Tucson, Arizona, by air, which

required that he leave his practice abruptly and travel some six thousand miles [Tr. pp. 241; 46-49, Findings X-XX] in order to serve the Jeffcotts, the operation in question immediately fell into a class, as to surrounding circumstances, entirely apart from such eighteen operations [Tr. p. 249].

The cross-examination of Dr. Donovan [Tr. p. 276] brings this situation out with particular clarity, in the following manner, namely:

(Cross-examination by Mr. Robertson, of counsel for the Jeffcotts):

“Q. Did you take into consideration, doctor, the realization of the expense that Mr. and Mrs. Jeffcott were required to incur in connection with the charges of the doctors here, Dr. Carrell, Dr. Tappan and Dr. Thompson, the hospital and the expenses of the nurses? A. No, sir, that was not my concern at all.

Q. And the fact that they may have incurred some three thousand additional expense did not enter into your consideration at all? A. No, sir.

Q. The only way it might have affected your consideration would have been for you to increase the amount of your fee, realizing that they were spending that much money. Is that true? A. No, sir, it had no effect whatever upon my fee. My fee was special for operating on a baby six thousand miles away.

Q. Six thousand miles away from where? A. Six thousand miles away from me—Well, three thousand miles away from me—and saving the baby's life, traveling six thousand miles to do it—special.

Q. You would not have done it for twenty-five hundred dollars? A. I would not.”

While the cross-examination of Dr. Donovan as to what he would have charged for this operation at New York [Tr. pp. 225-228; 233-239] was not objected to, since it may have been entirely proper on the theory that understanding of such hypothetical situation may have thrown light on the question as to what portion of his demand was to cover the special aspects incident to coming to and performing the operation at Tucson, Arizona, such information throws little or no light upon the issue of what constitutes the reasonable value of Dr. Donovan's services, performed, as they were, under arrangements which required him to hurriedly depart from and temporarily abandon his practice, to fly to Tucson, to perform the operation there, to remain in post-operative care as needed and, then, to return to New York City.

In the second place, the fact that Dr. Donovan might have made lesser charges for operations involving volvulus of the newborn, can throw no light whatever upon the determination of what constitutes a reasonable fee to be allowed for his operation upon baby Jeffcott.

A physician is not bound by his customary charge.

Pfeiffer v. Dyer, 145 Atl. 284, 295 Penna. 306.

In this case, which is cited by appellants at page 22 of their brief, the Court held as above stated, and, at page 285 of its decision, made the following statement:

“Appellant's able counsel in the second branch of his argument advances a somewhat novel and startling

proposition as to the fees of a professional man, that 'a surgeon, without any agreement as to the amount of his fee, may not recover a fee based on what other surgeons would have charged *or think proper*, which fee is admittedly more than his own customary charge for the particular service,' which would mean that a physician, once having fixed his fee for a given service, never could increase it, or that the modest surgeon, who has been a modest charger and who has attained great skill, could not in a proper case receive the fair compensation to which others also of high professional standing believe him entitled. We would hesitate long before subscribing to such a rule, particularly in view of the services rendered by physicians to the afflicted without thought of compensation, customary or otherwise, of which plaintiff's own experiences are, we think, a fair sample. Pressed on cross-examination to state his customary fee for such an operation as that here involved, he said that in over twenty years of experience in surgery he had performed the operation six times, three times for nothing, and in explanation added that over half of his professional work was done for charity. This state of affairs the law must recognize, that physicians should not have their services valued, as you would commodities in trade, by a fixed standard; what would be a proper charge for the same service to a man fully able to pay would be excessive to a man of limited means, and what would be willingly done for the indigent, without thought of financial reward, should be compensated for by one who can afford to pay on the scale which doctors of repute measure as the proper one. Only on such a basis can those who devote their lives to ministering to human suffering in some degree be fairly paid."

The same rule of law is recognized and stated in another of the cases cited by appellants, such being

Citron v. Fields, 85 Pac. (2d) 535, 30 Cal. App. (2d) 51,

wherein the appellate court of California laid down the rule, during 1938, in the following language, namely:

“A physician is entitled to recover ordinary and reasonable charge for such service, as he has rendered, by members of the same profession of similar standing.”

The testimony of Doctors Downes, Burdick and Beekman, indicating them to be surgeons of standing similar to that of Dr. Donovan, was not contradicted.

Dr. Downes testified that the reasonable value of the services of Dr. Donovan, rendered to the Jeffcotts, amounted to between \$12,000.00 and \$15,000.00 [Tr. p. 326]. Dr. Burdick testified that such value was between \$10,000.00 and \$15,000.00 [Tr. p. 360]. Dr. Beekman testified that such value was between \$10,000.00 and \$15,000.00 [Tr. p. 404].

Appellants proceed to “submit”, on page 25 of their opening brief, that the award of the trial court should be deemed excessive because it constituted one-fourth of the net annual income to Dr. Donovan for the year 1939, during which year the operation in question was performed.

Appellants cite no authority to support such thought on their part.

The reason would seem obviously to be that there could be no authority for such contention.

The issue before the trial court was the determination of what constituted a reasonable charge for Dr. Donovan's particular service, in issue in such case, under the circumstances shown to have prevailed concerning the same.

It is unquestionably correct and logical that a fee of \$7,500.00 could and would have been reasonable for the operation in question had Dr. Donovan made no charge whatever for all other professional services rendered during 1939.

It is also correct that Dr. Donovan would not have been permitted to claim that his demand of \$12,500.00 was reasonable because it constituted only one per cent of his net annual income for 1939, assuming that such income had been in the sum of \$1,250,000.00 instead of the amount which he testified.

The fact stands out that the reasonableness of Dr. Donovan's fee and his annual income for 1939 are and must remain two wholly unrelated matters.

Appellants also advance the argument, on pages 25 and 26 of their opening brief, that the fee awarded to plaintiff is excessive in view of the financial condition of the Jeffcotts.

In support thereof, appellants comment that the trial court found [Tr. pp. 51-52] that the Jeffcotts, at the time of such operation, were worth approximately \$80,000.00 net, but here, again, appellants continue in their unsound theory that they were without financial ability to pay because they were without net annual income, regardless of net worth.

Most of the cases cited by appellants on page 22 of their opening brief, as indicating the modern rule that the courts in cases of this type may consider the financial ability of the patient to pay, show conclusively that the courts do not regard that the having of "net annual income" is to be considered to the exclusion of consideration of financial worth without income.

That ability to pay is not measured only by net annual income, is indicated by the following cases, to-wit:

In Succession of Levitan, 79 So. 829, 143 La. 1027,
3 A. L. R. 1646;

Citron v. Fields, 85 Pac. (2d) 535, 30 Cal. App.
(2d) 51;

Houda v. McDonald, 294 Pac. 249, 159 Wash.
561;

Young Bros. v. Succession of Von Schoeler, 91
So. 551, 151 La. 73;

Lange v. Kearney, 4 N. Y. S. 14, 51 Hun. 640.

In the latter case, the Court's opinion on such point is found to be as follows:

"It must be further observed that, although the sum demanded by the plaintiff seems to be large in contemplation of the defendant's income, nevertheless it appears that he is the owner of property, and, although it may embarrass him, or subject him to inconvenience, he can pay it—he has the ability to do so. It may be justly said that the plaintiff saved the life of the defendant's son, and by a master performance, which united skill, knowledge and experi-

ence, without which it could not have been done. The exceptions are valueless. * * * The measure of compensation must be controlled more or less by ability, in all the professions, and the service rendered by its responsibilities and success."

The record of this cause, now before this Court on appeal, will indicate to a high degree that the above-quoted opinion could well be used in disposing of this case.

The appellants then proceed, on pages 26 to 28 of their opening brief, to argue that it is evident, from the size of the fee awarded, that the trial court was influenced by evidence concerning the financial condition of the parents of defendant, David C. Jeffcott.

The weakness of this contention by appellants is typified by the statement, appearing on page 27 of the opening brief, that "It is difficult to point out this assertion by specific examples, as the cold, written text of the transcript of testimony cannot portray the tone of voice and attitude of the court."

Such excursion beyond the record should not merit consideration by this Court under any circumstances.

Appellee, however, wishes to point out just to what extent there is no justification for the assertion of appellants that "A reading of the transcript of testimony will show that the Court's attitude was completely reversed from and after the time when this testimony came into the trial."

The transcript, on pages 81 and 82, indicates that, counsel having announced themselves as being ready to proceed with the trial, Mr. Jeffcott was called by counsel for appellee for cross-examination under the rule.

The Court first spoke, when appellants objected to the form of a question and were overruled [Tr. p. 86].

The next exhibition of the “tone of voice” of the trial court came, following a colloquy between counsel, when the court directed Mr. Jeffcott to answer as far as possible within his knowledge [Tr. p. 90].

Thereafter, the Court spoke a few words, as follows:

“Speak louder, Mr. Jeffcott, I have difficulty in hearing you.” [Tr. p. 94];

“It may be admitted and marked.” [Tr. p. 96];

“What is that, Mr. Witness?” [Tr. p. 97]; and

“Any objection to it Mr. Robertson?”, “It is admitted.”, “If there is any occasion to read it, you may do so.” and “Go ahead.” [Tr. p. 98].

The Court was not called upon to and did not thereafter speak until counsel for appellants made objection to cross-examination of Mr. Jeffcott concerning his parents [Tr. pp. 99-100], where there is transcribed the following examination and remarks, namely:

“(Cross-examination of Mr. Jeffcott:)

“Q. How many children in all do you have? A. We now have three.

Q. The first two were girls? A. Correct, sir.

Q. And this— What is your father’s name?” A. My father’s name is Robert Crawford Jeffcott.

Q. And this son of yours, Robert Crawford Jeffcott, is your father’s first grandson, isn’t that correct? A. Yes, sir.

Q. And your father, Robert Crawford Jeffcott, was extremely interested in that son of yours at the time he was born?

Mr. Robertson: I object to the grandfather—

Mr. Allen: The child was named for him.

Mr. Robertson: I happen to have one named for me, too. The grandfather is not a party to this litigation.

The Court: Unless you make a showing as to the materiality, it is not admissible."

Thereafter and immediately following such remarks by the Court, the matter was discussed by counsel and the Court, counsel for Dr. Donovan indicating that such testimony was offered to show that the infant operated upon was of outstanding importance to the Jeffcott family, placing an out-of-the-ordinary responsibility upon the surgeon [Tr. pp. 100-101].

At the close of such discussions the Court ruled as follows:

"I shall permit the question to be answered and reserve the ruling as to admissibility." [Tr. p. 102].

Such preliminary question was answered under such reserved ruling.

The cross-examination along such line was then resumed [Tr. p. 106], with the following question:

"Q. Now, to go back a moment, Mr. Jeffcott, to the question of the importance of your son, in the Jeffcott family, it is a fact, is it not, that your father, Robert Crawford Jeffcott, is an extremely wealthy man?"

Appellants again objected [Tr. p. 106] and counsel for Dr. Donovan made the following statement to the Court, namely:

"Mr. Allen: I again assert that we make no claim against Robert Crawford Jeffcott, senior, or the

mother, but we maintain, as previously outlined to the court, that we have a right to go into the nature of the responsibility of this surgeon with regard to any peculiar or unusual importance that might have been placed by the family upon this particular child, and this question is foundational as to the natural line of inheritance which would be expected to follow in this family. That is the purpose of it.” [Tr. pp. 106-107.]

The Court then commented upon such matter and ruled as follows:

“The Court: I suppose the importance to the plaintiff in this case of this testimony is the importance of the child to the parents.” [Tr. p. 107] and

“The Court: Let the question be answered and the court will reserve the ruling. If this seems to the court remote and should not be considered, the court will disregard it altogether. The question may be answered with the understanding that the ruling is reserved.” [Tr. p. 107].

The comments of the Court, to and including such ruling, indicate only fair and ordinary conduct in presiding at the trial.

Appellants do not refer to any incident or comment, thereafter to become a part of the record, which would even suggest the reversal of attitude which they mention.

There is no such incident or comment; and there was no such reversal of attitude.

At no time thereafter, did appellants request that the trial court make its reserved ruling. No request was made by appellants that any of such testimony be stricken and disregarded by the trial court.

There is nothing cited or referred to by appellants and there is nothing within the record to indicate that the trial court relied upon any of such evidence in making its findings and conclusions or in making and entering its judgment.

While it is not conceded that any of such evidence was immaterial and inadmissible, under all of the circumstances of the case, error would not lie, in the absence of some conclusive showing that the trial court relied thereupon.

In 26 *Ruling Case Law*, at page 1085, the rule is stated to be as follows:

“* * * it is the general rule that error will not lie for the admission of irrelevant or incompetent evidence in a case tried before the court, without a jury, at least where it does not appear that the court relied upon the incompetent evidence in making its decree.”

This rule was laid down by the Supreme Court of the United States at an early date.

Weems v. George, 14 L. Ed. 108, 13 How. 190.

Typical early state decisions are:

Frish v. Reigelman, 43 N. W. 1117, 75 Wisc. 499;

Maynard v. Locomotive Engrs. etc., 51 Pac. 259,
16 Utah 145.

The rule holds today, and is now the law in the State of Arizona, where it is held that it is to be assumed on review that a court hearing a case without a jury dis-

regarded incompetent evidence, where there is sufficient competent evidence to sustain the judgment.

Cooper v. Francis (1930), 285 P. 271, 36 Ariz. 273;

Little v. Brown, 11 P. (2d) 610, 40 Ariz. 206;

Glaspie v. Williams, 51 P. (2d) 254.

The reason for such rule has been rather well stated by the Supreme Court of the State of Nebraska, in the case of

Rupert v. Penner, 53 N. W. 598, 35 Neb. 587,

the language of which decision has been adopted by the editors of *Ruling Case Law*, as follows:

“The reason for this rule has been said to be that the court must necessarily have an opportunity to examine each article of evidence offered, even for the purpose of rejecting it; and so the duty of acting and deciding the cause on the legal and relevant evidence selected from the mass that may have been introduced may be as well discharged by the court upon the final consideration of the cause as to pause in the course of trial to pass on the admissibility of the several matters offered in evidence.”

26 R. C. L. 1086, note 12.

Furthermore, the appellants are in no record position to predicate error upon the trial court's receiving the evidence complained of by appellants on this appeal.

Where a court reserves its ruling on objection to evidence which has been offered, if the objection is not re-

newed and the court's attention directed to it again, the objection will be deemed waived.

Lee v. Farmers' Mut. etc., 241 N. W. 403, 214 Iowa 932;

Evans v. Heaton, 233 N. W. 281, 57 S. D. 436;

Ross v. Mutual Life, 191 N. W. 428, 154 Minn. 186, 31 A. L. R. 46.

Appellants, on pages 27 and 28 of their opening brief, quote from the remarks of the trial court, appearing on page 450 of the transcript.

The Court, in connection with an objection of appellants, commented as follows:

“The Court: The relationship between the witness, the defendant in this case, and the one to whom this indebtedness is due is before the court. How much further can you go in the matter, Mr. Allen? The relationship between this defendant and the man to whom this indebtedness, this sum, *is due for advances on the mortgage*, is the relationship of father and son, isn't that all?” (Italics are those of the briefer.)

Counsel for the appellee took such remarks of the Court to amount to a statement that the trial judge understood that the amount previously under discussion by Mr. Jeffcott [Tr. p. 448], “this sum, x due for advances on the mortgage” had been advanced to Mr. Jeffcott by his father; understood that the relation of creditor and debtor existed, in addition to the relation of father and son; intended to disregard the relationships within the Jeffcott family in all further regard; and desired that the line of examination be continued no further.

The question, to which appellants had objected, giving rise to such comment by the trial court, was thereupon withdrawn by appellee.

The correctness of appellee's interpretation of the comment by the trial court, above quoted, was further demonstrated, when the Court made this further comment:

"The Court: I do not see the necessity of going into the ramifications. The implication is apparent as to the relationship and the establishment of the indebtedness. If there is some other purpose, all right." [Tr. p. 450].

Appellants state, page 28 of their brief, that this last comment demonstrates that the court had fallen a victim to some insidious conduct of appellee.

The Court said, first, that "the implication is apparent." What implication? The implication that, since the mortgage lien on his property was in favor of his parents, the ultimate necessity of paying off the lien might be obviated by inheritance from the parents.

Counsel for appellants had just admitted such possibility [Tr. p. 449].

What then, immediately following such admission, could be so wrong with the Court stating that such implication was apparent?

The Court said further, in qualifying the implication which was apparent, that it was "as to the relationship and the establishment of the indebtedness."

It is apparent from appellants' brief that they wish this Court to construe that the trial court was referring to the establishment of the indebtedness between David C. Jeffcott, the defendant below, and Dr. Donovan, the plaintiff below.

Such is very clearly not the case. The trial court was merely continuing the prior comment, in which it was made very definite that the reference was to the indebtedness between the father and son, "for advances on the mortgage."

Counsel for appellants might be correct in the theory, voiced by novel expression, that the trial court could not "unring a bell," but appellants have wholly failed to make any showing that any bell had been rung.

There is nothing within the findings, in such regard, other than the facts that Mr. David C. Jeffcott had received financial aid from his parents, in setting himself up in the ranching business, and that he and Mrs. Jeffcott were indebted to his mother, upon a mortgage, for part of the advances. Such facts are supported by the evidence of Mr. Jeffcott. When considered in light of Mr. Jeffcott's testimony that the interest on such mortgage debt, since its inception during 1939 and shortly following receipt of Dr. Donovan's statement, had not been paid other than by further increases of the principal debt [Tr. pp. 447-448], such facts bear directly upon the issue as to the financial ability of the Jeffcott couple to pay for the services of Dr. Donovan.

III.

The division of appellants' opening brief numbered III is directed to the admission by the trial court of the testimony, by deposition, of Doctors Downes, Burdick and Beekman, as has to do with appellants' Specifications of Error V, VI and VII (Op. Brupp 10-14).

The position of appellants, in such respect, is that such expert witnesses were all permitted to answer a hypothetical question which did not contain assumptions to show the financial condition of the Jeffcotts, although each of such witnesses testified that he regarded that ability to pay was one of the elements customarily taken into consideration by eminent surgeons in determining their fees.

It is not correct that the financial ability was not submitted to such experts.

The hypothetical questions propounded to these experts, Downes, Burdick and Beekman, each contained an assumption in substantially the following language, namely:

"and if it be further assumed that such agent or agents, then and thereupon and in the further course of such negotiations and pursuant to the further authority and instructions of such parents and for and on behalf of such parents, did advise the said Dr. Donovan that the said parents did not desire that such infant be taken to New York for such operation, that they were desirous that Dr. Donovan perform such operation, in preference to any other physician and surgeon, that money was no object to them in the matter of such proposed employment and that they desired and requested that Dr. Donovan fly to Tucson, Arizona, as soon as possible by airplane, and there perform such operation, regardless of cost to them." [Tr. pp. 321-322, 355, 399-400.]

Such hypothetical questions contain further assumptions that Dr. Donovan came to Tucson, by air, and performed such operation, expressly relying upon such representations of such defendants [Tr. pp. 322, 355, 400].

What more could Dr. Donovan have been reasonably required to submit to such experts?

These experts were told to assume, in arriving at and expressing their opinions, that the Jeffcotts had advised Dr. Donovan, in the course of negotiating his employment, that their wishes were contrary to his in the matter of such proposed employment, that they wanted him to concede to their demands, regardless of cost to them, and that money was no object to them.

Every man is presumed, at law, to speak the truth. The conduct and dealings of every man, until the contrary is shown, is presumed to be open and honorable.

When these experts were given such hypothesis, concerning the employment negotiations, wherein the Jeffcotts represented that money was no object and that they wanted Dr. Donovan to come to Tucson for the operation, regardless of cost to them, such experts were entitled to assume that the Jeffcotts were telling the truth and were dealing with Dr. Donovan in an open and honorable manner.

Such a representation by the Jeffcotts can only be taken to mean that they had the ability and willingness to pay such reasonable fee as Dr. Donovan might charge, if he would change his plans and come to Tucson. No other construction can be placed upon the statement by Mr. Jeffcott, that money was no object, unless it be assumed that he was not telling the truth and that his intention was to mislead and take unfair advantage of Dr. Donovan.

The experts were privileged, even bound, to put such ordinary interpretation upon such representation by the Jeffcotts. They were unquestionably entitled to assume that the Jeffcotts had such self-asserted ability to pay.

The Jeffcotts, in inducing Dr. Donovan to make the trip to Tucson, stated that they had unlimited ability to pay. Dr. Donovan relied thereon. Dr. Donovan submitted such matters to his experts.

Dr. Burdick, on cross-examination, was asked the following question and gave the following answer:

“Q. What did you know about the financial condition of the patient’s parents? A. All I know is that Donovan said in the first place when they called up they said that money was no object.” [Tr. p. 375.]

This testimony well indicates the natural and proper consideration given by such expert to such statement of inducement, made by Mr. Jeffcott.

The other three experts called on behalf of Dr. Donovan all indicated that their opinions were arrived at without knowing the financial condition of the patient’s parents.

Had appellants seen fit to cross-examine on such point, it is entirely reasonable to assume that such experts, like Dr. Burdick, would have indicated that they regarded that the statement by Mr. Jeffcott, that money was no object, had obviated any consideration other than that the financial ability of such parents was ample.

Appellants, in such division III of their *Argument*, state that it is the general rule that all material facts must be contained in a hypothetical question, if the opinion of the expert is to be properly received.

Appellants' cited authorities do not appear to bear them out in such interpretation and assertion of the rule.

The rule is stated in *Jones on Evidence*, Third Edition, section 371, pages 559-560, as being that "it is sufficient if the question fairly states such facts as the proof of the examiner fairly tends to establish, and fairly presents his claim or theory."

The writer of such text, at page 563, makes the further comment that:

"If the hypothetical question properly presents the facts which the evidence tends to prove, and does not call upon the witness to reconcile conflicting evidence or to pass upon the merits of the case, a wide range may be given by the court, and a liberal discretion allowed as to its form."

The cases of *Dedonato v. Wells* and *Hahn v. Hammerstein*, cited by appellants on page 30 of their opening brief, lend no support to the statement of appellants as to the general rule.

In the former case, well known causes for a condition, in issue in such case, were expressly excluded from consideration by the expert, with the result that the court held that the question did not call for an opinion of a fair nature. In the second case, undisputed evidence was excluded and only impotent facts were assumed and submitted to the expert, causing the court to properly exclude the impotent and valueless opinion based thereon.

Even if it be taken, for the sake of argument, that the hypothetical question here complained of did not assume all of the facts bearing upon the financial ability of the defendants below, such omission of some of the facts would not render the opinions of the experts inadmissible.

The fact that an expert's judgment is not based on all of the facts of the case goes to its weight, rather than to its competency.

32 C. J. S. 220 (Evidence, Sec. 521);

Dunigan v. Appalachian Power Co., 33 Fed. (2d) 876, 68 A. L. R. 1393;

Mathiesen v. Smith, 60 Pac. (2d) 873, 16 Cal. App. (2d) 479.

In the latter case, the court stated the rule to be as follows:

"Then, again, hypothetical questions may be framed either upon all of the facts or any part thereof. An opinion not founded on all of the facts in the case goes to the weight of the evidence and not to its competency or materiality."

Dean Wigmore, in his usual exhaustive manner, states the rule in the following language, namely:

"The question, on principle, *need not include* any particular number of facts; *i. e.*, it may include any one or more facts whatever, and *need not cover all the facts which the questioner alleges* in his case. The questioner is entitled to the witness' opinion on any combination of facts that he may choose. It is often convenient and even necessary to obtain that opinion on a state of facts falling short of what he or his opponent expects to prove, because the ques-

tioner cannot tell how much of the testimony the jury will accept; and if proof of the whole should fail, still proof of some essential part might be made and an opinion based on that part is entitled to be provided to the jury. For reasons of principle, then, and to some extent of policy, the natural conclusion would be that the questioner need not cover in his hypothesis the entire body of testimony put forward on that point by him or the opponent, but may take as limited a selection as he pleases and obtain an opinion on that basis. Such is the orthodox doctrine as applied by most courts."

Wigmore on Evidence, Third Edition, Sec. 682 (b), page 807.

If opposing counsel thinks that facts have been omitted from the hypothetical question which are essential to forming a conclusion, his remedy is to put those additional facts before the witness on cross-examination.

11 *Ruling Case Law* 580.

An examination of the lengthy cross-examination, on behalf of the Jeffcotts, of Donovan's experts will indicate that appellants failed to submit to such experts any hypothesis presenting their view of their financial condition, or of their ability to pay.

Having so failed, the appellants cannot now maintain that the trial court should not have received the opinions of the experts because the hypothetical questions failed to include matters advanced by the appellants on their theory of showing their lack of financial ability to pay.

Dr. Donovan's theory of the case was that the Jeffcotts had represented to him that money was no object, that he had relied thereon, and that such representation

had a definite meaning, being that he was thereby entitled to charge what he considered a reasonable fee for his services under all of the prevailing circumstances [Tr. p. 259].

Dr. Donovan's theory was fairly submitted to each expert.

Dr. Burdick, being the only one of Donovan's experts that was cross-examined in such respect, indicated that he took such representation into account in arriving at his stated opinion, as indicating financial ability of the Jeffcotts [Tr. pp. 375-377].

While, as previously brought out, there is no justification for such an assumption, if it be assumed, for the sake of argument, that the other experts did not take such declaration of ability into consideration, the worst that can be said about such assumed situation is that their opinions are flexible, as to amount, because of lack of knowledge concerning financial ability.

Only once did counsel for the Jeffcotts submit to any of Dr. Donovan's experts any hypothesis concerning the Jeffcotts' ability to pay [Tr. pp. 376-377]. Such line of cross-examination was possibly abandoned, as undesirable to the Jeffcotts, after the following results with Dr. Burdick:

"XQ. 141. You have not yet answered my question as to whether or not, assuming the facts that I have stated as to the net worth of the parents and their annual income of \$5,000, that that would make any difference in your estimate of the value of Dr. Donovan's services? A. I would say that anybody with an income of \$5,000 a year did not have any right to expect a fellow to fly down from New York to operate on their baby." [Tr. p. 377.]

IV.

Appellants' Specification of Error VIII is discussed in division IV of their opening brief on pages 31 to 33, inclusive.

Appellants say that Specification VIII speaks for itself.

If such be true, it speaks rather loudly of confusion on the part of appellants, as the one possibility, or "grabbing at straws," as the other.

Specification VIII, pages 14-20 of such brief, quotes much of the testimony, objections, argument and rulings relative to the effort, on behalf of Dr. Donovan, to show that the Jeffcott infant in question was the first grandson of a wealthy man, upon the theory that such showing would bear upon the special importance of such infant to its parents.

These quotations indicate that the theory of such offer was that such evidence tended to show the degree of responsibility undertaken by the surgeon in accepting and performing the employment to perform a delicate and extremely hazardous operation.

Counsel for appellants also quote, in such specification, from his cross-examination of Dr. Donovan, claiming that such quotation shows that Dr. Donovan did not take any unusual responsibility into account in determining the charge which he should make.

It is believed that all of the quoted cross-examination will convince this Court that Dr. Donovan had in mind only to deny any suggestion that his interest in saving the life of the child depended, to any degree whatever, upon the importance of the child to the parents. It is wholly reasonable to doubt that Dr. Donovan realized that he

was testifying that degree of responsibility, based on importance of or position in life of the patient, would never constitute part of the foundation for his charges.

When it is considered that Dr. Donovan testified that the element given second prominence by him in determining a fee was the responsibility which he had to assume in operating upon the particular patient [Tr. p. 198], it would seem quite strongly indicated that Dr. Donovan was thinking in terms of what effect the importance of the child would have upon his exercise of knowledge, skill and attention in an effort to save the child's life.

It is hardly open to question that this surgeon would exercise the same high degree of skill and care to save the life of an indigent child as he would to save that of a possible heir to millions. It is much to be doubted, however, that he intended to testify that such a difference of family importance, growing out of difference in financial position, would not be regarded as increasing his responsibility and would not be taken into account in determining what constituted a proper charge for his operation and services.

The appellants seem to take the position that the knowledge of the surgeon as to any such unusual responsibility would have had to exist at the time the operation was being performed if it were to be entitled to consideration on making the charge.

The fallacy of such position is very apparent.

It is wholly apparent that a surgeon of this importance might be called upon to operate upon some newborn, suffering from a condition similar to the one in issue, and perform the operation without having time to give any

thought to the family importance of the infant or under circumstances which might lead to the assumption that the family position was wholly ordinary. It is also possible that, after the operation had been performed, it would come to the attention of the surgeon that such infant was, in fact, heir apparent to the throne of England. It is wholly absurd to say that such a development could not be regarded by the surgeon as having tremendously enhanced his responsibility or that it should not be taken into account in fixing his fee.

Be all of such as it may, there is nothing in the record to show or even to suggest that the trial court gave any consideration whatever to any of such offered evidence concerning the Jeffcott family situation.

In the absence of any finding upon such point, it must be assumed that the trial court did not base its conclusions and judgment upon any element of special or extraordinary responsibility of the surgeon as to the Jeffcott operation.

Appellants state, on page 32 of their brief, that they feel that it is apparent from the record of the case that Dr. Donovan made his charge with the thought in mind that the grandfather would pay his fee.

With due respect for the feelings of appellants, such statement by them is wholly without justification.

The only material on such point, within the entire record, is directly and pointedly to the contrary, such being the following excerpt from the transcript of the cross-examination of Dr. Donovan:

“Q. Is it not a fact, doctor, that this statement and this charge you make—that the charge was made

and the statement was sent with the hope or expectation that the grandfather would take care of the bill?
A. No, sir. No, sir, positively not." [Tr. p. 259.]

Not only is the record devoid of any evidence or showing to support such feeling by appellants, if such they have, but there is no finding to support the same.

When it be considered that it is not pertinent to show even that other surgeons would have been willing to perform the same operation for less than the fee charged,

Kline v. Blackwell, 63 Fed. (2d) 897,

and that the reasonableness of a physician's charge cannot be established by proof of what he charged another person in a similar case,

L. R. A., 1917-A, p. 1269; and

Marshall v. Bahnsen, 57 S. E. 1006,

it readily becomes apparent that no appropriate purpose could have prompted appellants to cite, on page 32 of their brief, what they term to be "cases which show comparative fees which have been awarded."

The general weakness of the appellate position of the Jeffcotts is indicated by this resort to insinuation that this Court should not sustain an award of \$7,500.00 in this case, with its mass of evidence justifying such award, because some court, at some place, many years ago and under wholly disrelated circumstances, made lesser award for some type of medical or surgical attention.

V.

The facts of this case, which highly support the findings, conclusions and judgment of the trial court, are fairly simple.

Baby Jeffcott was born at Tucson, Arizona, during March, 1939. A few days thereafter it became apparent that he suffered a complete obstruction of the intestine and required major surgery. The attending physicians recommended or suggested Dr. Donovan, practicing in New York City, as being a pediatric surgeon of outstanding experience and qualification for the performance of the operation. Arrangements were made that the baby be flown to New York for such surgical attention. The parents, appellants herein, decided that they preferred to have the operation performed at Tucson, since such procedure would inconvenience fewer people. In order to be further assured that Dr. Donovan would consent to come to Tucson, they represented that money was no object. Dr. Donovan, relying upon such representation, left his New York practice and flew to Tucson, where he performed a very successful and satisfying operation, of a delicate and dangerous nature, without which the Jeffcott infant would have died. Dr. Donovan's fee was not made the subject of contract or discussion. About a month after the operation, he presented a statement of his fee, making a charge of \$12,500.00 for his services, without additions for his travel expense. Appellants refused to pay such fee, representing that, while they were worth approximately \$100,000.00, net [Tr. p. 9], they were without "net annual income" from their ranch and were unable to pay such fee. Having paid \$2,500.00 on account of such demand, as an asserted salve to their

consciences, they then refused to pay anything more and this action was brought.

Dr. Donovan showed his qualifications; the circumstances surrounding his employment, including the representation that money was no object and his reliance thereon; the circumstances concerning his performance of the service; the indications of ability of the Jeffcotts to pay, including the apparent ability of the Jeffcotts to spend heavily in connection with the care of the infant and its mother, the lack of indications of concern about expense and the signed admission of Mr. Jeffcott that he and his wife were worth approximately \$100,000.00 at a time shortly after the operation; that three experts, all being eminent surgeons of New York City, regarded that his services were worth between \$10,000.00 and \$15,000.00; and that a Tucson pediatrician, formerly having practiced in New York and being one of the attending physicians at Tucson and having been the assistant in performance of the operation in question, regarded that the operation was worth in excess of ten thousand dollars.

Dr. Donovan testified that he regarded that his service, under the prevailing circumstances, was reasonably worth the sum of twelve thousand five hundred dollars.

He then rested his case.

The Jeffcotts then introduced evidence that they were actually of a net worth of approximately \$80,000.00 at the time of the operation; that such worth consisted of a cattle ranch, from which they had no net income; and that three physicians of Tucson, Arizona, one of them practicing no surgery whatever, believed that from \$1500.00 to \$2000.00 constituted a reasonable fee for the services of Dr. Donovan.

In addition, the Jeffcotts showed that, for the five years beginning with 1937, they had been financially able, through operation of their ranch and borrowing, to expend approximately \$44,000.00 for the purchase of cattle and approximately \$83,000.00 for ranch expense; and that, for the four years, beginning with 1938, in like manner, they had been financially able to and had made personal expenditures exceeding \$40,000.00, about \$650.00 of which had been dividend income.

The Jeffcotts then rested.

The trial court then found that a fee of \$7,500.00 was reasonable for the service in question and awarded judgment for the unpaid balance amounting to five thousand dollars.

Some portions of the testimony, heretofore referred to, indicate that Dr. Donovan tended to rely upon the representation of the Jeffcotts that money was no object, upon the indications that they were not concerned about the amount of his fee and upon the indications that they were not making any effort to keep down expense, rather than upon a definite ascertainment of their worth and income.

There is no law cited by appellants and none known to appellee which would require Dr. Donovan, under such circumstances, to prove financial ability of the Jeffcotts to pay.

To say that some courts hold that a surgeon may consider ability to pay, in making his charge, and that he may show financial condition of his patient, in his action for his fee, is one thing. To say that he is required to consider or to show financial condition, is an entirely different matter.

This is pointedly indicated by one of the cases cited by appellants, wherein the California Court of Appeals, during 1931, after considering at length the conflicting holdings as to the admissibility of evidence as to financial condition of the patient, commented in this manner, namely:

“Irrespective, however, of the question of materiality of evidence showing financial condition of the patient, there is ample testimony in the record to support the full allowance made by the jury for the reason that several witnesses testified that, regardless of the financial condition of Haas, Zumwalt’s services were reasonably worth \$1500 to \$2500.”

Zumwalt v. Schwarz, 297 Pac. 608, 112 Cal. App. 734.

All of the evidence, bearing upon financial condition of the Jeffcotts, can be regarded as never having become a part of the record of this case, and there would still be ample testimony to support the judgment, since at least two of the experts for Donovan testified that, regardless of financial condition of the Jeffcotts, Donovan’s fee should exceed \$10,000.00 [Tr. pp. 152, 405].

The testimony of all experts for Donovan was entitled to special consideration by the trial court.

Dr. Donovan had shown himself to be [Tr. pp. 162-179] and was admitted to be [Tr. p. 148] one of the most eminent pediatric surgeons in this country. His eminence had been acquired in practice at New York City.

Two of his experts were also pediatric surgeons who had gained and who held eminence in practice at New York City. The third was an eminent surgeon of such city.

Their testimony falls into that valuable class of evidence mentioned by the Eighth Circuit Court of Appeals, in a case involving an action for fees of specialized patent attorneys, the following being said:

“Here the litigation is different. It is not local, but national, and is conducted mainly by specialists, and their judgment is the best evidence as to what is reasonable for such services.”

and

“Litigation of this kind is national, and not local. To confine testimony in such a case to what is usual in the community is simply to deny one of the valuable sources of information. *Knowledge of the usual compensation for such service can only be learned from those who live in the centers where such litigation is most frequent*, and to deny a litigant to produce the testimony of persons having that kind of qualification is to substitute theory for experience.” (Italics are those of the briefer.)

Coca-Cola Co. v. Moore, 256 Fed. 640.

The California court of appeals, in the case of *Citron v. Fields*, cited by appellants, states an elementary and universally recognized rule in the following manner:

“The rule is well settled that, in considering the testimony, it should be remembered that the construction to be given it must be that which will support the judgment of the court, if reasonable conclusions based thereon warrant, and any conflict of the testimony must be resolved against the appellant.”

Where there is evidence to support the judgment of the trial court, the appellate court will not assume that it is better qualified to determine the issues of fact, limiting its inquiry to alleged error of law and to determining that the action of the trial was not wholly unwarranted by the evidence.

If there is evidence to support the judgment, it will not be disturbed.

The presumptions are that all of the action of the trial court was proper.

Such propositions are too elementary to necessitate citations of authority.

The appellee submits that the record of this cause contains a generosity of competent evidence to support an award and judgment substantially in excess of those given to Dr. Donovan; that the appellants have not carried the burden of showing wherein error of law was committed by the trial court; and that appellants have wholly failed to show that the trial court received or considered any improper and prejudicial testimony or evidence.

There is no resemblance of basis for the reducing of the award of the trial court or for the granting of a new trial.

The judgment of the trial court should be affirmed.

Respectfully submitted,

LESLEY B. ALLEN,

Attorney for Appellee.

No. 10251

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

DAVID C. JEFFCOTT and ELSIE JEFFCOTT, his wife,

Appellants,

vs.

EDWARD J. DONOVAN,

Appellee.

APPELLANTS' REPLY BRIEF.

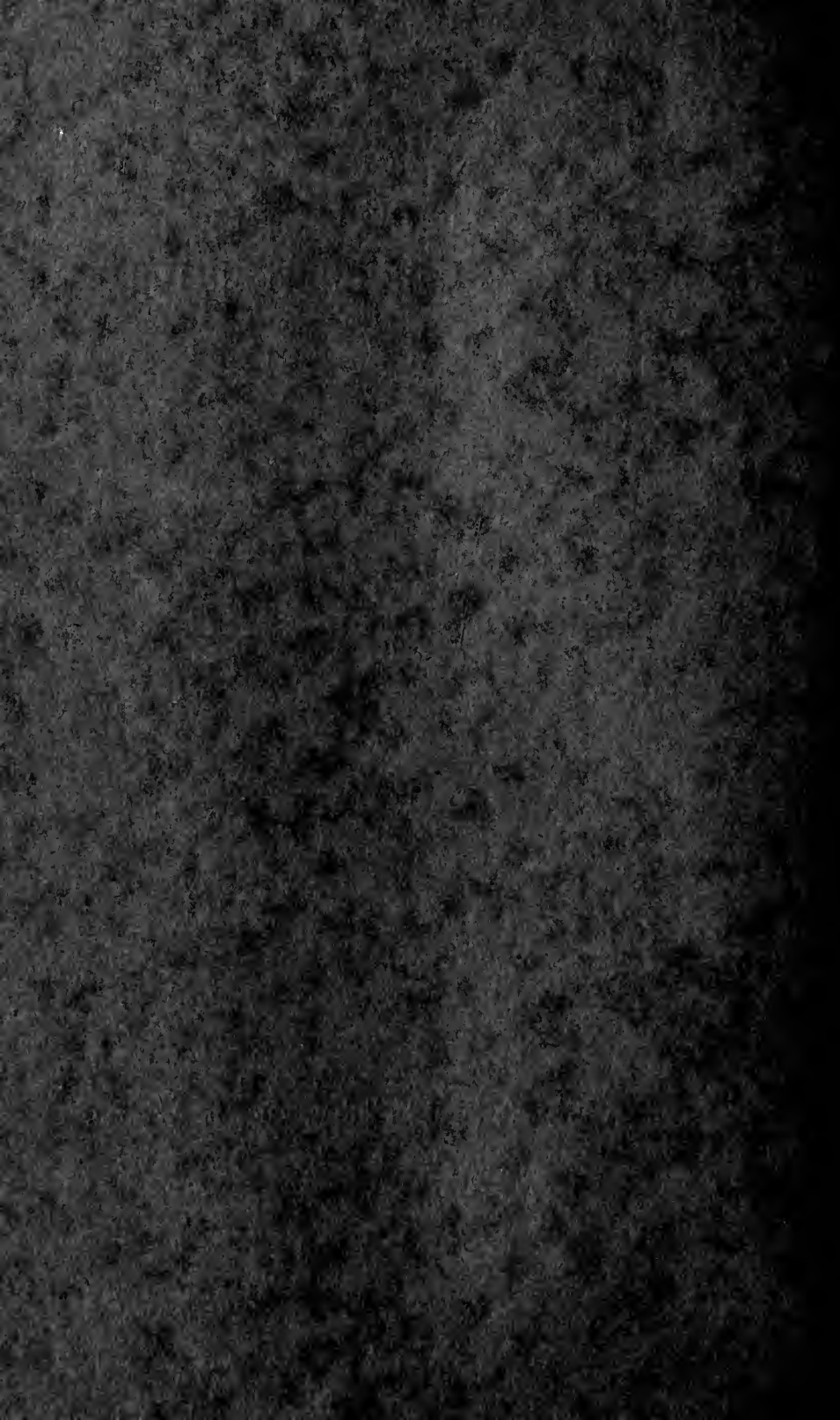
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We desire to comment upon only a few of the additional facts included in appellee's statement of the case.

Once again on pages 2 and 3 of appellee's brief, he dwells upon the fact that Mr. Jeffcott, according to Dr. Thompson's testimony, stated that "money was no object". Throughout the trial of this case in the lower court, and throughout appellee's brief, he adopts the attitude that this should settle the matter and Dr. Donovan be permitted to charge any amount that he himself considered reasonable. Repeatedly during the trial this thought was urged and throughout this brief it is again urged. Fortunately, however, the appellants and the appellee have presented their respective cases to a court of law. It is a situation where services were performed upon an implied contract and the award for those services

is not to be determined by any state of mind held by one or both of the contracting parties. It is purely on the basis of *quantum meruit* and a consideration of every fact and circumstance is to be given in determining what constitutes reasonable compensation to be paid by the appellants and to be received by the appellee. Any pre-conceived notions that either may have had must be weighed in the balances and moderated to fit the circumstances of the parties to the action. In the final analysis, the court makes the contract which the parties should have made before the services were performed.

On page 3 appellee states that no consideration should be given to the development, existence and condition of ventral hernia in the Jeffcott infant. Mrs. Jeffcott was permitted to testify, without objection [Tr. pp. 462-463], that the condition of ventral hernia was first noticed four or five weeks after the child was brought home from the hospital. That it was thereafter diagnosed by Dr. Carrell when the baby was four and one-half or five months old. She had previously stated that the hernia would have to be operated and that it continued draining for between eight months and a year after the operation. Dr. Thompson [Tr. p. 538] testified that on or about the 1st of October, 1939, there was a tiny spot in the wound from which he was told there occurred perhaps a fourth of a teaspoon of drainage during certain twenty-four hour periods. Whether or not it be considered as a fecal fistula, an incisional hernia, a ventral hernia, or a hole in the child's stomach through which a liquid substance drained and the intestines protruded, which hole was in the wound left by the operation, seems to us to be of relatively the same weight. In any event, the child has

a condition which, according to Dr. Carrell, will have to be operated and corrected.

Once again, however, we do not wish to place too much stress upon this isolated fact and state that it is simply to be considered along with everything else in the case. We do not even wish to be charged with saying that this condition was due to neglect on the part of Dr. Donovan. It is simply a condition which will necessitate the expenditure of additional money and should be considered in determining what reasonable compensation should be paid to Dr. Donovan.

Appellee, in the last paragraph on page 4, again stresses Mr. Jeffcott's failure to discuss the fee with Dr. Donovan prior to his departure. His explanation [Tr. p. 93] was that he intended to discuss the matter Monday afternoon prior to Dr. Donovan's departure. Dr. Donovan [Tr. p. 222] stated that he did not feel it his place to approach Mr. Jeffcott. Here again let us say that whoever was at fault, or most at fault, and irrespective of who might have had the greatest obligation, these facts must merge into the complete picture and be considered only as elements going into a determination of what is a reasonable fee. It would appear that had the parties discussed the matter while Dr. Donovan was in Tucson that their ideas were so far apart that no agreement would have been reached. Mr. Jeffcott's idea of perhaps a thousand dollars was only \$11,500 short of what Dr. Donovan thought, unless Dr. Donovan's ideas came into existence after being told while in Tucson by Dr. Carrell [Tr. p. 478] that Mr. David C. Jeffcott was a man of very moderate means, but that his father did have considerable money. We rather imagine this was the case.

Appellee's comments on pages 5 and 6 of his brief as to the obligation of appellee to make out a *prima facie* case are somewhat puzzling. This is not an argument for a directed verdict at the close of appellee's case, but a discussion on appeal of the entire case which covers the evidence of both appellee and appellant. Evidence of the ability of the patient to pay was introduced and whether or not it was an obligation of appellee to prove this, it is evidence which materially affects the amount of his recovery.

Reply to Argument of Appellee.

I.

Appellee contends that appellants' defense involved only the following propositions (Appellee's Brief p. 7): (1) that their ability to pay should be measured only in terms of annual income; (2) that Dr. Donovan was obligated to determine his fee on the basis of taking a percentage of their net annual income; and (3) that, since they had no net annual income at the time the operation was performed, appellee had no right to any fee beyond the sum which was paid him in order to "free our consciences".

If this be true, why did appellants introduce evidence showing the development of the ranch from 1937 to 1939, which was the date of the operation, and continue thereafter, over appellee's objection, to show the increased earnings from the venture and their hope that by 1942 a net profit of between \$5,000 and \$8,000 per year might be realized. Appellants considered that their net income was only one of a number of facts entering into a determination of their financial ability, which in turn con-

stitutes one element or fact going into a determination of what was reasonable compensation for Dr. Donovan. At no time during the trial was it ever suggested, and at no time in this brief will it be suggested, that Dr. Donovan was entitled to no compensation because the ranch was being operated at a loss at the date of the operation. Such fact should, however, be considered.

It is true that Drs. Gore, Holbrook and Carrell all testified that it is a nationally recognized practice, as a general rule, for surgeons to charge one-tenth or one-twelfth of a person's annual income for a major surgical operation. These doctors admitted that where Dr. Donovan was required to fly from New York to Tucson and return, being away from his office for approximately sixty hours, that additional compensation should be awarded. In their expression of opinion as to what a reasonable fee would amount to, they made allowance for these additional elements. In the hypothetical questions propounded to them there was incorporated the fact that no net profit would be shown for 1939 but that in later years it was hoped that a net profit would be earned. Notwithstanding this fact, they testified that Dr. Donovan should receive from \$1500 to \$2000, plus expenses, for his services. How then can counsel say that it is, or has ever been, our position that net income is the sole criterion of ability to pay? We simply attempted to show the complete picture and the fact that the fee charged amounted to approximately two years' net income, if and when their peak earnings would be reached. It amounted to approximately fifteen per cent of their entire wealth. It amounted to one-third of Dr. Donovan's gross earnings for that year. The fee awarded

by the lower court amounted to one-fourth of his net income for that year and one year's net earnings for the appellants when their peak earnings might be reached. We cannot believe, thus this appeal, that such an award constitutes reasonable compensation, but we do not say that he should be confined only to a percentage of net income.

Appellee's comments upon appellants' objections to Finding XXVIII are not substantiated in that appellants' offered amendment [Tr. p. 40] did not contain any summary of receipts and expenditures without explanation for a period of five years. Again and again appellee repeats that the court found that the appellants expended over \$40,000 for "personal expenditures" during this four-year period. No reference is made to the fact that over \$6,000 of this amount was incurred on behalf of Baby Jeffcott, over \$5,000 for income taxes incurred in a liquidation of securities, and a large portion of the \$15,000 for 1938 was in reality capital investments in the ranch. Appellee would like for this court, as well as the trial court, to consider that appellants spent money lavishly for personal comforts.

Appellee also criticizes our objections to the inclusion of the court in its Finding of Fact that David C. Jeffcott received a gift from his father, that he borrowed money from his father and executed a mortgage in favor of his father, and subsequently his mother. These facts of course were true, but we see no reason why the court should have emphasized this relationship unless the court was influenced by the fact that the money was borrowed from his father, and as appellee states later on in his brief, "the ultimate necessity of paying off the lien might

be obviated by inheritance from the parents". (Appellee's Brief p. 27.) What place does such a comment have in this brief and what place did such an implication have in the court's finding or in the court's attitude during the trial of this cause? Can the trial court be permitted to speculate as to whether or not David C. Jeffcott will ever inherit any money from his father? It may be said that such is the usual case, but we do not believe that courts of law in this country have gone so socialistic as to base a judgment against an individual upon future possibilities of inheritance. With the modern trend of estate taxes, the Federal Government might take over this mortgage to insure payment of estate taxes. Appellee also states that the fact that Mr. Jeffcott was able to borrow this money "tends strongly to indicate ability to pay". (Appellee's Brief p. 12.) This is another example of the attitude of appellee during the trial of the case to label this as a "source of income". Is the court to presume that inasmuch as Mr. Jeffcott has been able to borrow this money to develop the ranch, that he will be able to go further and borrow an additional \$5,000 to pay this judgment? If such be the case, the decision is not based upon the financial condition of Mr. Jeffcott, but upon the possibility that he may be able to borrow additional money. There is no evidence of such fact.

II.

We, of course, do not expect that the charges made by Dr. Donovan for other operations in New York would limit him to even the highest charge that he had made for the operation performed in Tucson. He would certainly be entitled to more compensation. However, the amount of these operations performed by an outstanding

surgeon with a Park Avenue address in New York, throw considerable light upon his regular schedule of charges. The court prevented us from inquiring into the ability to pay of these other patients. It is likely, however, that a man of his eminence, with a select class of patients, would have charged around his top price on these operations. He even testified himself that had this operation been performed in New York that he would have charged between \$3,500 and \$5,000. He did not elaborate upon why an operation performed for Mr. Jeffcott would be in excess of the highest charge that he had ever previously made. At any rate, these other charges are simply additional facts to be considered, no one of which is to be conclusive.

Dr. Donovan's testimony shows that he is a busy man and great demands are made upon him for his services. The amount of his charges and his gross annual income both throw some light upon his customary charges, which in turn shows an important, but not a conclusive element in the fixing of his charge. Appellee states (p. 18): "The fact stands out that the reasonableness of Dr. Donovan's fee and his annual income for 1939 are and must remain two wholly unrelated matters." We do not believe this court will completely divorce the two.

Appellee's response to our charge that the court was influenced by evidence relating to the wealth of Mr. Jeffcott's father impresses us as being lame. He grabs a time worn appellate court stamp and slaps it on the record and says: "It must be presumed that the court was not influenced by this evidence and that it was disregarded." We fully appreciate the numerous rubber stamps that were available to appellate courts before this appeal was

initiated. Ordinarily every presumption and intendment is resolved in favor of the trial court's decision. This court is at perfect liberty to adopt any one of those stamps and dispose of this case. We have sufficient confidence, however, in the integrity of our United States Appellate Courts so that we know that the court will read the entire transcript of testimony, consider counsels' briefs, and then determine whether or not the lower court considered all of the evidence, all of the elements going into a determination of the fee, and then determine whether or not the lower court apparently was influenced by incompetent evidence in making its decree. This falls clearly within the general rule stated in 26 R. C. L. p. 1085.

In that regard, however, we wish to point out to the court the fact that the trial court overruled our objection to evidence of the wealth of appellant David C. Jeffcott's father on several occasions. [Tr. pp. 102, 106, 107.] The court finally stated [Tr. p. 107]: "Let the question be answered and the court will reserve the ruling. *If this seems to the court remote and should not be considered, the court will disregard it altogether.* The question may be answered with the understanding that the ruling is reserved." We do not believe that appellants' counsel had an obligation to renew these objections and request a specific ruling at the close of the case. The mention in Finding No. XXVIII of appellant's parents indicates that the court did not ignore this evidence.

The law upon this point is simply that when a case is tried to the court without a jury, and there is submitted evidence, some of which is competent and some incompetent, and there is sufficient of the former kind to sus-

tain the judgment, it will be assumed on review that the court disregarded the incompetent evidence in arriving at a conclusion and that its admission was harmless.

Cooper v. Francis, 285 Pac. 271 at 273.

The effect of this rule is that it makes no difference as to whether the court sustained the objection, overruled the objection, or simply did not rule upon it. If he improperly admits the evidence, the appellate court may say that he disregarded it; if he rejects it, it may be proper; if he does not rule, the court will say that it was disregarded unless it appears from the record that he was influenced by it. Our position is that the amount of this award indicates that the court was influenced by it and that this state of mind was evidenced by its unconscious acceptance of Finding No. XXVIII. Additional evidence of this fact is contained in the court's statement [Tr. p. 450]:

"The Court: The relationship between the witness, the defendant in this case, and the one to whom this indebtedness is due is before the court. How much further can you go in the matter, Mr. Allen? The relationship between this defendant and the man to whom this indebtedness, this sum, *is due for advances on the mortgage*, is the relationship of father and son, isn't that all?" (Italics are those of the briefer.)

Why was there any discussion of the relationship between the father and son? Had it been asserted that this mortgage had not been executed in good faith? At no place in the proceedings had this been done. The court went ahead, [Tr. p. 450], to state:

"The Court: I do not see the necessity of going into the ramifications. The implication is apparent

as to the relationship and the establishment of the indebtedness. If there is some other purpose, all right.”

The court at this point fell as a victim to the snare intended. That was the implication that since the mortgage lien on appellants’ property was in favor of his parents, the ultimate necessity of paying off the lien might be obviated by inheritance from the parents. Appellee’s counsel states this as being the meaning of the phrase used by the court: “The implication is apparent.”

Once again, may we question the right of the court to consider such a remote possibility and use it as one of the elements to be considered by the court in fixing the contractual rights as between appellants and appellee and basing an award thereon. We feel that appellee in his brief has admitted that it is apparent that the court was influenced by this evidence. It is for this court to decide whether or not “any bell had been rung”. (Appellee’s Brief p. 28.)

III.

We will not spend much time in rearguing the admissibility of the opinions of Drs. Downs, Burdick and Beekman and refer to our opening brief on this matter. An additional statement of our position, however, is contained in *Citron v. Fields*, 85 Pac. (2d) 534, at 538, Note 6, where we find the following language:

“All of the elements that go into fixing the reasonable value of services must be considered by an expert in expressing an opinion relative to the reasonable value of the professional services performed. . . .”

We think this to be a fair modern statement of the rule that where a hypothetical question is propounded which calls for an answer upon the ultimate fact to be found by the court, that such question must contain all elements that the court must consider in determining that ultimate fact. It is conceded that the ability of the patient to pay is one of such elements. The hypothetical question propounded contained no facts proving, or tending to prove, such financial condition. Appellee attempts to beg the question by saying that the hypothetical question contained the statement that "money was no object". We do not believe that this bare statement satisfies the rule. If a man with an income of \$1200 a year, and gross worth of \$5,000, would make such a statement, would the court hold that the opinion of three New York doctors, speaking in the abstract, would conclusively establish what fee was reasonable? Here again we state that even if that statement was made by Mr. Jeffcott, that it furnishes no criterion or conclusive yardstick as to the amount of compensation Dr. Donovan might be entitled to receive, and did not furnish circumstance or evidence of financial ability sufficient to satisfy the requirement of the rule in the hypothetical questions propounded to these experts. Perhaps, as Dr. Burdick stated [Tr. p. 377], that anybody with an income of \$5,000 a year did not have any right to expect a fellow to fly down from New York to operate on their baby. However, if such a request is made, and an intermediary, such as Dr. Thompson (who subsequently found himself in an embarrassing position) calls such a doctor and the doctor, without securing any additional information, consents to fly down, his right to compensation must then be determined by the usual rules and evidence.

IV.

We are much impressed by appellee's efforts to explain away (Appellee's Brief pp. 36, 37, 38) the manner in which the evidence of the grandparents' wealth was introduced, which was on the theory that it added to the responsibility of Dr. Donovan in performing the operation, and then to state in this brief that even although consciousness of such responsibility did not exist at the time of the operation, that it was subsequently brought to his attention. Had counsel been equally frank in the trial of the case, we feel sure that the trial court would never have permitted the evidence to be admitted upon a reserved ruling. The only place that it could have occupied any relevant position would have been on the theory that the grandparents were responsible for the payment of Dr. Donovan's fee. Counsel states that if a doctor has performed an operation upon an infant under circumstances that would lead him to the assumption that the family position was ordinary, that thereafter if it came to his attention that such infant was in fact heir apparent to the throne of England, that he would not be entitled to fix a higher fee on account of the tremendous enhancement in his responsibility. We do not believe the analogy is applicable because in that case the Bank of England and the Throne of England would be responsible for the payment of the fee.

We emphatically state that this evidence was introduced upon a representation to the court which was later disproved by appellee's own testimony and which was certainly known at the time when such representation was made.

V.

Appellee dwells considerably upon the importance to be attributed to the testimony of the three New York doctors who testified for Dr. Donovan. (Appellee's Brief, p. 43.) He also comments upon the fact (p. 41) that three physicians of Tucson, Arizona, one of them practicing no surgery whatever, believed that from \$1500 to \$2000 constituted a reasonable fee for the services of Dr. Donovan. We think that the case cited by appellee, *Coca-Cola Co. v. Moore*, 256 Fed. 640, explains why appellants had no New York doctors testify for them. On page 643 of this decision, the court states:

"We do not understand that the decision in *Ward v. Kohn* was intended to limit testimony to lawyers of the particular city in which the services were rendered. There would be distinct objections to such a rule. When plaintiffs are eminent members of the bar, their brethren of the same bar are reluctant to give evidence against them in a suit for their compensation. *Esprit du corps* is a factor in such cases which courts cannot disregard. In the medical profession it is considered unprofessional for one doctor to testify against another in civil litigation."

This decision comments upon the fact that knowledge of the usual compensation for such services can only be learned from those who live in the centers where such litigation is most frequent. We would like to point out the fact that Drs. Carrell, Gore and Holbrook, practicing in Tucson, a recognized health resort, stated that they were familiar with fees charged by eminent physicians and surgeons coming to Tucson from distant places to perform medical and surgical services. New York City has no patent rights upon operations for intestinal obstruc-

tions. Moreover, such operations are not in a class by themselves, but are simply operations requiring a high degree of skill, such as any number of other delicate operations. Brain surgery, heart surgery, operations upon the eye, internal operations, and others too numerous to mention, require specialized skillful attention. We feel that the Tucson doctors were equally competent to express an opinion upon the value of these services, although we recognize the fact that certain professional men from eastern centers do not admit the existence of others skilled in their particular profession outside of their own metropolitan areas.

In closing, we wish to state simply to the court our belief that a fair consideration of the entire testimony and of *all* of the elements that enter into a determination of a reasonable fee will lead the court to the conclusion that a substantial reduction should be ordered in the award of the lower court.

Respectfully submitted,

DARNELL & ROBERTSON,

Attorneys for Appellants

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vs.

EDWARD J. DONOVAN,

Appellee.

PETITION FOR REHEARING.

LESLEY B. ALLEN,
Mayflower Hotel, Los Angeles,
Attorney for Appellee.

FILED

JUL 12 1943

PAUL P. O'BRIEN,
CLERK

No. 10251.

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

DAVID C. JEFFCOTT and ELSIE JEFFCOTT,
his wife,

Appellants,

vs.

EDWARD J. DONOVAN,

Appellee.

PETITION FOR REHEARING.

*To the United States Circuit Court of Appeals for the
Ninth Circuit:*

Comes now the said appellee, petitioning for rehearing of the above entitled cause, and represents to the court the following:

I.

That the said cause was argued upon the merits, subject to the determination of the trial court's jurisdiction, and was submitted to this court on or about February 12, 1943.

II.

That on April 19, 1943, judgment was entered by such Circuit Court in such cause, reversing and remanding the same because of the fact that said appellee had defectively alleged the diversity of citizenship of the said parties.

III.

That no amendment was proffered at the time of such argument.

IV.

That appellee thereafter moved for leave to amend, in order to properly plead diversity of citizenship, as well as diversity of residence, of the said parties.

V.

That such motion was denied by this court; and time for the filing of petition for rehearing was extended.

VI.

That, as appears from affidavits now on file herein, the diversity of citizenship of the parties actually existed at the time this action was filed in the trial court and the trial of such cause was therein conducted and judgment thereby entered on the theory that diversity of citizenship of such parties did exist.

VII.

That the decision and judgment of this court did not take into account the merits of the case; did not dispose of any of the issues raised upon this appeal; and reversed and remanded only on the finding that jurisdiction of the trial court had neither been alleged nor shown.

VIII.

That such jurisdictional point had not been raised by appellants; and first came to light when members of this court questioned counsel at the time of the argument of the cause on appeal.

IX.

That notwithstanding the court's decision that said appellee is not entitled to amend in this appellate court, a rehearing and a deciding of the issues raised on the appeal would be in keeping with the desire of this court to do substantial justice, where possible, and to avoid multiplicity of trials and appeals.

X.

That appellee believes and submits that decision of the issues raised on appeal, subject to proper allegation and proof of the existing diversity of citizenship, should be had for the following reasons, to-wit:

a. That, by statute, the appellee is entitled to amend in order to properly allege diversity of citizenship; and

b. That, if the cause is remanded only upon the present opinion and judgment of the court, amendment and proof of diversity of citizenship may be had without the parties, the trial court or this court knowing what disposition of the case upon its merits may be or should be ultimately made by this court; but

c. That if this court rehears and decides the issues of the appeal in favor of the appellee, then the cause may be remanded with directions that the judgment of the trial court shall stand in the event that appellee shall amend his pleadings and make proper proof of the facts relative to diversity of citizenship; or

d. That, should this court rehear and decide the issues on appeal in favor of the appellants, the cause may then be remanded for new trial on its merits as well as on the issue of diversity of citizenship; and

e. That rehearing and consideration of and ruling upon the issues raised on appeal would advise the parties

as to the merits of their respective contentions on appeal and could well result in a final disposition of the case by settlement and without further proceedings and expense, whereas, on the other hand and upon reversal and remand only on the jurisdictional point, the lack of decision on the merits could well result in the following proceedings, namely:

Further proceedings in the trial court on the issue of diversity of citizenship;

Further appeal to this court on the very same issues which are now before it on this appeal; and

Ultimate reversal and remand on one or more of such issues,

all before the parties might be in position to consider their respective positions in light of appellate determination of the issues which have been raised on this appeal.

XI.

That the case has been argued on its merits; and that rehearing can be had without the necessity of further argument.

Wherefore, the said appellee prays that said cause be reheard and considered upon its merits; prays that all of the issues on appeal be considered and adjudicated; and prays that proper judgment and mandate be made, entered and issued in such cause, to permit amendment of the pleadings, proper proof thereunder and final disposition of the cause in light of this court's disposition of the issues raised on this appeal.

LESLEY B. ALLEN,
Attorney for Appellee.

State of California, County of Los Angeles—ss.

Lesley B. Allen, being first duly sworn according to law, deposes and says: That he is attorney of record for Edward J. Donovan, appellee herein; that he has prepared the foregoing Petition for Rehearing and knows the contents thereof; that such petition is well founded and that such petition is not interposed for delay.

LESLEY B. ALLEN.

Subscribed and sworn to before me this 9th day of July, 1943, by Lesley B. Allen.

F. GEORGE HERLIHY,
Notary Public.

My commission expires Jan. 27, 1944.

United States 7
Circuit Court of Appeals
For the Ninth Circuit.

ANDERSON-COTTONWOOD IRRIGATION
DISTRICT,

Appellant,

vs.

J. R. MASON,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

FILED

NOV - 3 1942

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

ANDERSON-COTTONWOOD IRRIGATION
DISTRICT,

Appellant,

VS.

J. R. MASON,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Northern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF
ATTORNEYS:

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Stockton, Calif.

Attorneys for Appellant.

PAUL A. McCARTHY, Esq.

Mills Tower,

San Francisco, Calif.

Attorney for Appellee.

In the District Court of the United States for the
Northern District of California, Northern
Division

No. 7996

In the Matter of

ANDERSON-COTTONWOOD IRRIGATION
DISTRICT, Debtor.

STATEMENT OF FACTS ESSENTIAL TO
DECISION OF APPEAL

Anderson-Cottonwood Irrigation District, herein-
after called "Appellant", having appealed to the
United States Circuit Court of Appeals for the
Ninth Circuit from a certain order made and en-
tered in the District Court of the United States for
the Northern District of California pursuant to a

motion made in said Court in behalf of J. R. Mason, a creditor of said district, hereinafter called "Appellee", the following statement has been prepared and agreed upon by counsel for Appellant and Appellee under Rule 76 of the Rules of Civil Procedure, as showing how the questions arose and were decided in the District Court and setting forth the facts essential to a decision of the questions by the Circuit Court of Appeals, to wit:

That Appellant filed in the above entitled Court on the 18th day of June, 1938, a petition for the confirmation of a certain plan of composition with its creditors under Chapter X of the Federal Bankruptcy act, which chapter was designated Chapter IX of said act as revised by the Chandler act, approved June 22, 1938. [1*]

That by Interlocutory Decree of said Court made and entered therein on the 15th day of January, 1940, said plan of composition was confirmed.

That Appellee and certain other creditors of said district duly appealed from said Interlocutory Decree to the United States Circuit Court of Appeals for the Ninth Circuit.

That said appeal was thereafter dismissed by said Circuit Court of Appeals and the mandate dismissing said appeal was duly issued on the 20th day of February, 1941.

That thereafter on the 7th day of July, 1941, a Final Decree in said matter was signed which said

*Page numbering appearing at foot of page of original certified Transcript of Record.

Final Decree was filed on the 9th day of July, 1941, and was, except Schedule A attached thereto, in words and figures as follows, to wit:

[Title of District Court and Cause.]

FINAL DECREE

This cause came on before me this day to be heard upon the application of petitioning district, Anderson-Cottonwood Irrigation District, for an order finally discharging it from all liability for and decreeing the cancellation and annulment of its outstanding old obligations affected by and refinanced pursuant to its plan of composition heretofore approved by this Court, and upon the written report filed with the Clerk of this Court by The Anglo California National Bank of Number One Sansome Street, San Francisco, California, the Disbursing Agent heretofore appointed in this cause, and the Court having seen and examined the application and report and the evidence offered in support thereof, and being fully advised in the premises, finds:

(1) That the petition for composition of indebtedness filed in this cause by the petitioning district and the acceptance and approval thereof by holders of more than fifty-one per centum (51%) of its outstanding indebtedness were, in all things, in compliance with law and have been duly approved by this Court; and

(2) That the offer or plan of composition as set forth in the petition filed in this cause was duly accepted in writing and approved by the holders of more than sixty-six and two-thirds per centum ($66\frac{2}{3}\%$) of its outstanding indebtedness affected thereby; was proposed and accepted in good faith; is fair, equitable and just; was to the best interests of and does not discriminate unfairly in favor of any creditor or class of creditors, and has been fully approved by this Court according to law; and [2]

(3) That in order to raise the funds with which to fully consummate its plan of composition, the petitioning district, with the approval of this Court, has issued and sold its new serial bonds to the Reconstruction Finance Corporation, an agency of the United States Government, in the principal amount of Three Hundred Thirty-nine Thousand Dollars (\$339,000.00), all dated July first, 1939, bearing interest at the rate of four per centum (4%) per annum from date until paid, interest payable semi-annually, and evidenced by interest coupons thereto attached, the numbers, principal amount and maturity dates of which are fully set forth in Schedule A hereto, to which said schedule reference is hereby made, and by this reference made a part of this Final Decree, the same as if fully set forth herein; and that so far as these proceedings are concerned, the new

bonds are valid and enforceable obligations of the petitioning district; and

(4) That the petitioning district issued and sold its new bonds to the Reconstruction Finance Corporation and received therefor the sum of Three Hundred Thirty-nine Thousand Dollars (\$339,000.00), Three Hundred Thirty-six Thousand Three Hundred Dollars (\$336,300.00) of which was deposited with the Anglo-California National Bank of Number 1 Sansome Street, San Francisco, California, for the purpose of purchasing the old issues of bonds pursuant to the plan of composition of indebtedness of said petitioning district; that in addition to this deposit, there was also deposited with the said The Anglo California National Bank of Number 1 Sansome Street, San Francisco, California, by the petitioning district the sum of Seventy-seven Thousand Nine Hundred Eighty-four and Seventy-five/100 Dollars (\$77,984.75); that said The Anglo California National Bank, as Disbursing Agent, pursuant to the order of this Court and the plan of composition of indebtedness of the petitioning district approved in this cause has disbursed the sum of Three Hundred Eighty-nine Thousand Four Hundred Eighty-five and Sixty-one/100 Dollars (\$389,485.61) for the purpose of taking up and refinancing certain outstanding old obligations of the district and which were duly cancelled by the Disbursing Agent and deliv-

ered to the petitioning district; that the said Disbursing Agent has filed in this cause its written report fully showing the amounts received and disbursed by it, the purposes for which such disbursements were made, including the payment into the registry of this Court of the sum of Twenty-four Thousand Seven Hundred Ninety-nine and Fourteen/100 Dollars (\$24,799.14), being the amount remaining in its hands on the twenty-second day of May, 1941; and that the report and the receipts and disbursements certified to therein should be confirmed and approved, and the Disbursing Agent discharged from further duties and liabilities as such; and

(5) That the plan of composition is binding upon all creditors affected by it, whether secured or unsecured, and whether or not their claims have been filed or evidenced, and, if filed or evidenced whether or not allowed, including creditors who have not, as well as those who have, accepted it; and that petitioner has made available for the creditors affected by the plan the consideration provided for therein and should be discharged from all debts and liabilities dealt with in the plan, except as provided therein; and [3]

(6) That all costs, expenses, fees and other charges properly chargeable to the petitioning district in this cause, have been duly approved and paid,

It is, therefore, ordered, adjudged and decreed as follows:

(a) That the receipts and disbursements by, and the other official acts of the Anglo California National Bank of Number 1 Sansome Street, San Francisco, California, Disbursing Agent, as set forth and certified to in its report filed in this cause, be and the same are hereby approved and confirmed and that its duties as disbursing Agent be terminated and its liabilities thereunder be forever discharged; and

(b) That the sum of Twenty-four Thousand Seven Hundred Ninety-Nine and Fourteen/100 Dollars (\$24,799.14), paid in to the registry of this Court by the Disbursing Agent, be disbursed by the Registrar for the purpose of taking up and retiring and refinancing, in accordance with the plan of composition approved in this cause, such remaining outstanding old obligations of the petitioning district as are affected by the plan of composition, and which may be presented to the Registrar for that purpose within the period of twelve (12) months from the date hereof; that all such obligations so presented and paid for, be forthwith cancelled and returned to the petitioning district by the Registrar; that all such outstanding old obligations of the petitioning district which are not so presented to the Registrar within twelve (12) months from the date hereof shall thereafter be forever barred from participating in the plan of composition or in the funds held in

the registry of this Court; that upon the expiration of the period of twelve (12) months from the date hereof, the Clerk of this Court shall forthwith notify the Reconstruction Finance Corporation, by registered letter addressed to it at Washington, D. C., of the amount of funds then remaining in the registry of the Court, and that the same are available for the purchase of new bonds of the petitioning district then held by the Reconstruction Finance Corporation, at par and accrued interest; that any new bonds so purchased shall be forthwith cancelled and returned to the petitioning district by the Registrar; that any part of such funds which are not used for such purpose within sixty (60) days after the date of the mailing of such notice, shall thereupon be paid by the Registrar of this Court to and used solely by the petitioning district in the payment of its new bonds and interest thereon; and

(c) That all the old bonds and other obligations of the petitioning district affected by the plan of composition approved in this cause, whether heretofore surrendered and cancelled or remaining outstanding, and by whomsoever held, are hereby cancelled, annulled and held for naught as enforceable obligations of the petitioning district, except as herein provided, and that the holders thereof be and they are hereby forever restrained and enjoined from otherwise asserting any claim or demand what-

soever therefor as against the petitioner district or its officers, or against the property situated therein or the owners thereof; and [4]

(d) That the new or refunding bonds issued and sold by the petitioning district to the Reconstruction Finance Corporation and the collection of the principal and interest thereon, shall not in any wise be adversely affected by these proceedings, or by any order, judgment or decree entered or rendered in this cause, and

(e) That all proceedings necessary for fully effecting the plan of composition contemplated by this action, except the ministerial duties of the Registrar of this Court, as provided herein, have been done and performed in accordance with law, and that all and singular the orders, judgments and decrees heretofore entered and rendered in this cause, be and the same are hereby ratified and confirmed.

Done at Sacramento, California, on this, the 7th day of July, 1941.

HAROLD LOUDERBACK

Judge.

Approved as to form under Rule 22 and receipt of a copy hereof acknowledged this 24th day of June, 1941.

PILLSBURY, MADISON &
SUTRO

FELIX T. SMITH

CHAS. F. PRAEL

RALPH ALFRED WOOD, JR.

Received June 25, 1941, and disapproved as to form as required by Rule 22 for the reason (1) that the form is injunctive (2) that so far as it is injunctive it does not comply with Title 28, Sec. 383 U.S.C. (3) that it provides for a time limit within which the creditors shall surrender their bonds and coupons which is not within the scope of Sec. 83 of the Bankruptcy Act of 1898.

W. COBURN COOK

Attorney for J. R. Mason, et al.

[Endorsed]: Filed July 9, 1941.

That prior to the signing of said Final Decree the then counsel for Appellee herein proposed to said District Court certain modifications of said Final Decree, in writing, as follows, to wit:

[Title of District Court and Cause.]

PROPOSED MODIFICATIONS OF FINAL DECREE

Comes now J. R. Mason, one of the respondents herein, creditors of the above named district, and pursuant to Rule 22 of said court proposes certain modifications of the Final Decree lodged with the Clerk herein on June 26th, 1941, and represents that because of the extensive character of these modifications the said respondent has entirely redrafted [5] the Final Decree in form hereunto annexed and proposes

the same as modifications of said proposed Final Decree.

W. COBURN COOK

Attorney for J. R. Mason,
Respondent.

[Title of District Court and Cause.]

RESPONDENT'S PROPOSED FINAL
DECREE

This cause came on before me to be heard upon the ex-parte application of petitioning district, Anderson-Cottonwood Irrigation District, for a final decree and upon the written report filed with the Clerk of this court by The Anglo California National Bank of Number One Sansome Street, San Francisco, California, the disbursing agent heretofore appointed in this court, and the court having seen and examined the application and report and the evidence offered in support thereof and being fully advised in the premises and having heretofore made its order allowing said report of the said Anglo California National Bank and discharging it as disbursing agent and it appearing to the court and the court finding that the Anderson-Cottonwood Irrigation District herein has within the time prescribed in the Interlocutory Decree made available for the creditors of said district the money and consideration provided under

the terms of the Interlocutory Decree and the Plan of Composition herein, and that there remained in the hands of said disbursing agent the sum of \$24,799.14 available for creditors under the terms of said Plan of Composition but which has not been paid to the said creditors because the said creditors did not within the period prescribed in said Interlocutory Decree present their bonds and coupons to the said disbursing agent for payment thereof and which said sum of \$24,799.14 has by the disbursing agent been paid into the registry of this court, now, therefore, on application of said Anderson-Cottonwood Irrigation District.

It is ordered, adjudged and decreed as follows:

(a) That the report of the said disbursing agent be and the same is hereby approved and confirmed and the said disbursing agent is discharged from further liability and relieved of further duty; and

(b) That the sum of \$24,799.14 paid as aforesaid into the registry of this court be disbursed by the Registrar to the creditors of said district pursuant to the Plan of Composition herein and the Interlocutory Decree to such remaining outstanding creditors as have not been paid upon presentation to the Registrar of their bonds and coupons as in said Interlocutory Decree and Plan of Composition provided, and that all such obligations so presented and surrendered to the

Registrar be forthwith cancelled and returned to the petitioning district by the Registrar, and that at the expiration of one year from the date hereof the said Registrar report his disbursements to the said court; [6]

(c) The court determines that the petitioner has made available for the creditors affected by Plan the consideration provided for therein and is hereby discharged upon the entry of this Decree from all debts and liabilities dealt with in the Plan of Composition except as provided therein and in said Interlocutory Decree, and the Plan of Composition therein approved is binding upon all creditors affected by it whether secured or unsecured and whether or not their claims have been filed or evidenced, and if filed or evidenced whether or not allowed, including creditors who have not as well as those who have accepted it.

Done at Sacramento, California, on this.....
day of July, 1941.

Judge, U. S. District Court.

That the then counsel for Appellee herein also filed in said District Court a memorandum of Points and Authorities in support of the form of Final Decree proposed by Appellee herein in which memorandum there was the following paragraph:

There is no provision in the statute for placing a time limit on when the creditors can re-

ceive the money or consideration deposited for them. As a matter of fact, the statute of limitations is certainly not less than four years and it might be pointed out that there is no more reason for terminating the right of the creditor to get his money from the Clerk of the court than for providing that after money has been on deposit with a bank for a year the depositor cannot get his money back.

That Appellee herein duly took an appeal from said Final Decree on the 7th day of August, 1941.

That said Circuit Court of Appeals, on the 21st day of March, 1942, affirmed said Final Decree in its entirety.

That thereafter the then counsel for Appellee herein filed in said Circuit Court of Appeals an Affidavit in words and figures as follows, to wit:

[Title of Circuit Court of Appeals and Cause.]

APPLICATION FOR ORDER SUSPENDING OPERATION OF FINAL DECREE

State of California, [7]

City and County of San Francisco—ss.

Peter tum Suden, being duly sworn, says:

That the "Final Decree" in this cause was entered in the United States District Court July 9, 1941, and an appeal was taken therefrom to the United States Circuit Court of Appeals for the Ninth Circuit wherein an order was entered affirming the decree on March 21st, 1942; that

subsequently an order was made withholding issuance of the mandate thereon pending application by appellant J. R. Mason to the Supreme Court of the United States for Writ of Certiorari; that affiant is now engaged in preparing said petition to the Supreme Court and will file the same shortly;

That said Final Decree (R. 204, 209) contains a provision to the effect that unless appellants' bonds and coupons are presented to the Registrar of the court for payment pursuant to the Interlocutory Decree (from which the appeal is taken) within 12 months from the date of the decree, which is July 9th, 1941, he "shall thereafter be forever barred from participating in the plan of composition or in the funds held in the registry of this Court;"

That while the statute, 11 U. S. C. A. sec. 403 (e) provides as to the interlocutory decree that if the same prescribes a time within which any action is to be taken, the running of such time shall be suspended during an appeal until final determination thereof, there is no such specific provision as to any time prescribed by the Final Decree, and therefore it is necessary to apply to this court for an order suspending the running of the time for presentation of appellants' claims until the final determination thereof, and accordingly application for such relief is hereby made.

PETER TUM SUDEN

Subscribed and sworn to before me this 15th day of April, 1942.

[Seal] MARY T. COLLINS

Notary Public in and for the City and County of San Francisco, State of California.

That thereupon the Honorable William Healy, a Judge of said Circuit Court of Appeals, made and filed an Order, in words and figures as follows, to wit:

ORDER

It is ordered that the running of the time within which appellant may present his bonds and coupons to the Registrar for payment pursuant to the plan of composition as provided in the Final Decree is suspended until and for a period of sixty days after the United States Supreme Court shall have passed upon applicant's petition for writ of certiorari or if such writ be granted until a [8] period of sixty days after the final decree shall have become final.

Dated: April 16, 1942.

WILLIAM HEALY

U. S. Circuit Court Judge.

[Endorsed]: Filed Apr. 17, 1942. Paul P. O'Brien, Clerk

That within the time allowed therefor Appellee herein filed in the Supreme Court of the United States a petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the

Ninth Circuit to review the decision of said Circuit Court of Appeals confirming said Final Decree.

That the Supreme Court of the United States denied a Writ of Certiorari in said matter on the first day of June, 1942.

That on the 6th day of June, 1942 the Mandate of said Circuit Court of Appeals was issued showing the affirmance of said Final Decree, which mandate was in words and figures as follows:

United States of America—ss:

The President of the United States of America

To the Honorable the Judges of the District Court of the United States for the Northern District of California, Northern Division,
Greeting:

Whereas, lately in the District Court of the United States for the Northern District of California, Northern Division, before you, or some of you, in the Matter of Anderson-Cottonwood Irrigation District, debtor, No. 7996, a final decree was duly filed on the 9th day of July, 1941, which said decree is of record and fully set out in said matter in the office of the Clerk of the said District Court, to which record reference is hereby made, and the same is hereby expressly made a part hereof, and as by the inspection of the Transcript of the Record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Ninth Circuit by virtue of an appeal prosecuted by

J. R. Mason, as appellant, against Anderson-Cottonwood Irrigation District, as appellee, agreeably to the Act of Congress in such cases made and provided, fully and at large appears:

And whereas, on the 6th day of March in the year of our Lord One Thousand Nine Hundred and forty-two the said cause came on to be heard before the said Circuit Court of Appeals, on the said Transcript of the Record, and was duly submitted: [9]

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court in this cause be, and hereby is, affirmed, with costs in favor of the appellee and against the appellant.

It is further ordered, adjudged, and decreed by this Court, that the appellee recover against the appellant for its costs herein expended, and have execution therefor.

(March 21, 1942.)

You, Therefore, Are Hereby Commanded, That such execution and further proceedings be had in the said cause as according to right and justice and the laws of the United States ought to be had, the said appeal notwithstanding.

Witness, the Honorable Harlan Fiske Stone, Chief Justice of the United States, the 6th day of June in the year of Our Lord One Thousand Nine Hundred and forty-two.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

Amount of costs allowed and taxed in favor of appellee and against appellant as per Annexed Bill of Items, Taxed in Detail: \$20.00.

PAUL P. O'BRIEN,
Clerk.

[Endorsed]: Filed and spread upon the minutes of the United States District Court of the Northern District of California, Northern Division, this 9th day of June, 1942. Walter B. Maling, Clerk by C. C. Evenson, Deputy. [10]

That thereafter within the time allowed therefor counsel for Appellee herein filed, in the Supreme Court of the United States, a Petition for a re-hearing of the aforesaid Petition for a Writ of Certiorari.

That on the 29th day of June, 1924, Counsel for Appellee herein made a motion in said District Court upon due notice, which motion was in words and figures as follows:

[Title of District Court and Cause.]

MOTION

Comes now J. R. Mason, creditor of Anderson-Cottonwood Irrigation District, and moves this court for an order suspending that part of the final decree which provides that the creditors must surrender and deposit their bonds with the Clerk of this Court on or before July 7th, 1942, or be thereafter barred from collect-

ing the amount provided by the plan of composition, and ordering that the time be extended until a reasonable period of time after the United States Supreme Court may have passed upon the petition for rehearing the petition for a writ of certiorari which has been filed in the United States Supreme Court.

Dated at San Francisco, California, June 18, 1942.

PAUL A. McCARTHY

Attorney for J. R. Mason.

That in support of said Motion an Affidavit for Appellee herein had been filed in said district court, which affidavit was in words and figures as follows, to wit:

[Title of District Court and Cause.]

AFFIDAVIT OF J. R. MASON

State of California

City and County of San Francisco—ss.

J. R. Mason, being duly sworn, says:

That he is a creditor of Anderson-Cottonwood Irrigation District owning securities affected by the plan of composition. That the final decree entered herein provides that unless said securities be surrendered and deposited with the clerk of this Court on or before July 7th, 1942, the said affiant will be thereafter barred and enjoined from securing the benefits of the plan

of composition and the same will thereafter be null and void; that affiant filed a petition for writ of certiorari in the United [11] States Supreme Court praying for a review of the decision of the Circuit Court of Appeals for the Ninth Circuit affirming the final decree and that said petition was denied on or about June 1, 1942; that affiant has caused to be prepared and has filed in the Supreme Court of the United States a petition for rehearing of said petition by and through his counsel Peter tum Suden and George T. Davis, of San Francisco, California; that affiant does not know when the said petition will be passed upon but it may not be passed upon prior to the reconvening of the Supreme Court in October, 1942, and therefore affiant would suffer great and unjust loss and injury if his petition for rehearing should be denied and he should not previously have deposited his bonds with the Clerk and surrendered the same, whereas on the other hand no financial or other injury will be sustained by the Anderson-Cottonwood Irrigation District if the time for depositing bonds be extended until a reasonable time after the Supreme Court has passed upon the petition for rehearing so that the action of the Supreme Court may become final one way or the other.

J. R. MASON

Subscribed and sworn to before me this 18th day of June, 1942.

[Seal] DOROTHY McLENNAN

Notary Public in and for the City and
County of San Francisco, State of California.

That on the first day of July, 1942, the Honorable Martin I. Welsh, Judge of said District Court made an order which is recorded in the minutes of said Court as follows:

The motion to suspend certain parts of final decree having been heretofore heard and submitted, being now fully considered, it is Ordered that the motion be and the same is hereby granted upon the condition that a bond in the sum of \$500.00 be given to secure the District against damages and costs. It is further Ordered that the creditors are hereby granted an extension of time to October 31st, 1942, within which to deposit their bonds with the Clerk of this Court instead of July 7th, 1942, as provided in the final decree. [12]

That on the 27th day of July, 1942, Counsel for Appellant herein filed, in said District Court, a Notice of Appeal from certain portions of said Order, which said Notice of Appeal is in words and figures as follows, to wit:

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Anderson-Cottonwood Irrigation District, the Debtor above-named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from that portion of that certain order made on the 1st day of July, 1942, by the Honorable Martin I. Welsh, granting the motion of J. R. Mason to suspend certain parts of the final decree entered herein on the 7th day of July, 1941, insofar as the granting of said motion had the effect of staying the enforcement of said final decree beyond the time when the Supreme Court of the United States shall have passed upon a certain petition for rehearing filed in that court by said J. R. Mason, which petition was for the rehearing of an order made by said Supreme Court denying a petition of said J. R. Mason for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review the decision of said Circuit Court of Appeals affirming said final decree, and from the further portion of said order granting to creditors of the above-named Debtor an extension of time to October 31, 1942, within which to deposit bonds with the Clerk of the above-entitled court for payment, instead of July 7, 1942, as provided in said final decree.

Dated: July 24, 1942.

L. C. SMITH

A. L. COWELL

Attorneys for Appellant

[Endorsed]: Filed July 27, 1942.

That simultaneously with the filing of said Notice of Appeal, Counsel for said Appellant filed in the said District Court a bond for costs on appeal, which said bond was in words and figures as follows, to wit:

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men by These Presents:

That Anderson-Cottonwood Irrigation District, Appellant named in the Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit [13] (under rule 73), dated July 24, 1942, as Principal and,

Standard Accident Insurance Company, a body corporate, duly incorporated under the laws of the State of Michigan, and authorized to act as surety under the Act of Congress approved August 13, 1894, as amended by the Act of Congress, approved March 23, 1910, whose principal office is located in the City of Detroit, Michigan, as surety are held and firmly bound unto J. R. Mason and to the United States of America and to the Clerk of the

above-entitled Court in the full and just sum of Two Hundred and Fifty Dollars (\$250.00) to be paid to them and/or to each and/or to any of them, and/or their respective successors, if any, as their respective rights may appear, in the aggregate amount of Two Hundred and Fifty Dollars (\$250.00), to which payment, well and truly to be made, we bind ourselves, our successors, heirs, executors and administrators.

Sealed with our seals and dated this 22nd day of July, 1942.

Whereas, the above-named Principal is about to file a notice of appeal, and to take an appeal to the United States Circuit Court of Appeals for the Ninth Circuit from certain portions of a certain order made and entered in the above-entitled proceeding on the 1st day of July, 1942, and files herewith its notice of said appeal; now, therefore,

The condition of the above obligation is such that if the said Principal shall prosecute its said appeal to effect and shall answer all costs taxed against it if it shall fail to make its plea good, then this obligation to be void; otherwise to remain in full force and effect.

It Is Further Stipulated as a part of the foregoing bond that in case of the breach of any condition thereof, the above-named District Court may, upon notice to the surety above-named, proceed summarily in said proceeding to ascertain the amount which said Surety is

bound to pay on account of such breach and render judgment therefor against said Surety and award execution therefor.

ANDERSON-COTTONWOOD
IRRIGATION DISTRICT

[District Seal]

By W. W. TREAT

President of its Board
of Directors

and

By ELLIS E. SHANNAHAN

Secretary of said Board
(Principal)

[Company Seal]

STANDARD ACCIDENT
INSURANCE COMPANY

By CHARLES E. COLE

Attorney in Fact.

State of California

City and County of San Francisco—ss. [14]

On this 22nd day of July, in the year One Thousand Nine Hundred and forty-two, before me, Vincent *PL* Laguens, a Notary Public in and for the said City and County of San Francisco, residing therein, duly commissioned and sworn, personally appeared Charles E. Cole, known to me to be the Attorney-in-fact of the Standard Accident Insurance Co., the corporation that executed the within instrument, and

known to me to be the person who executed the said instrument on behalf of the corporation therein named and acknowledged to me that such corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in the City and County of San Francisco, this day and year in this certificate first above written.

[Seal] VINCENT E. LAGUENS

Notary Public in and for the City and County
of San Francisco, State of California.

My commission expires March 27, 1945.

[Endorsed]: Filed July 27, 1942.

STATEMENT OF APPELLANT'S POINTS

The following is a statement of the points to be relied on by Appellant in this Appeal:

1. That the District Court had no power to stay the enforcement of said Final Decree beyond the time when the Supreme Court of the United States shall have passed upon said Petition for Rehearing.

2. That the District Court had no power to change the terms of said Final Decree in any manner whatsoever.

3. That said District Court had no power to grant to creditors of Appellant an extension of time to October 31, 1942, within which to deposit bonds with the Clerk of said Court for payment.

It Is Hereby Stipulated by and between Counsel for Appellant above-named and Counsel for Appellee above-named that the foregoing statement shows how the questions involved in this Appeal arose and were decided in the District Court and that said statement and the Transcript of Record on Appeal [15] hereinafter specified set forth so many of the facts as are essential to a decision of the questions by the aforesaid Circuit Court of Appeals, and that said Statement sets forth the points to be relied on by Appellant.

It is further stipulated that the Transcript of Record on Appeal in the case of Mason vs. Anderson-Cottonwood Irrigation District, No. 9951 in the United States Circuit Court of Appeals for the Ninth Circuit, shall be a part of the Record of Appeal herein, but need not be reprinted. In lieu of reprinting, five copies of said Transcript of Record on Appeal shall be filed with said Circuit Court of Appeals.

Dated this 8th day of September, 1942.

L. S. SMITH

A. L. COWELL

Attorneys for Appellant.

PAUL A. McCARTHY

Attorney for Appellee

The foregoing statement is hereby approved.

MARTIN I. WELSH

Judge of the District Court.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

[Seal]

WALTER B. MALING,

Clerk, District Court of the
U. S. Northern District of
California.

By F. M. LAMPERT

Deputy Clerk.

[Endorsed]: Filed Sep. 12, 1942. [16]

[Title of Court and Cause.]

STIPULATION EXTENDING TIME TO FILE
RECORD ON APPEAL

Anderson-Cottonwood Irrigation District, the debtor above-named, having on the 27th day of July, 1942, filed herein a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from certain portions of an order made herein on the 1st day of July, 1942, on motion of J. R. Mason,

It Is Hereby Stipulated by and between counsel for said district and said J. R. Mason that any Judge of the above-entitled Court may make an order extending to and including October 1, 1942,

the time for filing the record on appeal and docketing said appeal in said Circuit Court of Appeals.

L. C. SMITH

A. L. COWELL

Attorneys for Anderson-Cottonwood Irrigation District

PAUL A. McCARTHY

Attorney for J. R. Mason

[Endorsed]: Filed Sep. 3, 1942. [17]

[Title of Court and Cause.]

ORDER EXTENDING TIME TO DOCKET
APPEAL

Anderson-Cottonwood Irrigation District, the Debtor above-named, having on the 27th day of July, 1942, filed herein a Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit from certain portions of an order made, on motion of J. R. Mason, in the above-entitled matter on the 1st day of July, 1942,

It Is Hereby Ordered, pursuant to stipulation by both parties to said appeal, that Anderson-Cottonwood Irrigation District may have to and including October 1, 1942, for filing the Record on Appeal and docketing said appeal in said Circuit Court of Appeals.

Dated this 3rd day of September, 1942.

A. F. ST. SURE

Judge of the District Court

[Endorsed]: Filed Sep. 3, 1942. [18]

[Title of District Court and Cause.]

APPLICATION FOR ORDER FIXING
AMOUNT OF AND TIME TO FILE SUPERSEDEAS BOND AND DIRECTING
STAY OF PROCEEDINGS PENDING APPEAL FROM ORDER OF JULY 1, 1942.

This Application of Anderson-Cottonwood Irrigation District, the Debtor above-named, respectfully shows:

That on the First day of July, 1942, an order was made herein by the above-entitled Court granting to creditors of said District an extension of time to October 31, 1942, within which to deposit their bonds with the Clerk of the Court for payment, instead of July 7th, 1942, as provided in the Final Decree in the above-entitled matter, on file herein.

That said District filed herein on the 27th day of July, 1942, a Notice of Appeal from said Order to the United States Circuit Court of Appeals for the Ninth Circuit, and thereupon filed herein a bond in the sum of \$250 for costs on said appeal.

That counsel for the parties to said appeal have prepared and signed a statement in accordance with Rule 76 of the Rules of Civil Procedure, which statement has been approved by the above-entitled Court, but that said appeal has not yet been [19] docketed in the Circuit Court of Appeals, and said District has been granted until October 1, 1942 to docket said appeal.

That funds of said District have been deposited in the registry of this Court to pay certain creditors of said District who have not deposited their bonds or coupons for payment, as provided in the interlocutory decree made and entered herein, and that said funds are still in the custody of this Court.

That said District desires a stay of proceedings herein pending the final determination or dismissal of said appeal.

Wherefore Anderson-Cottonwood Irrigation District Respectfully Prays for an Order fixing the amount of a Supersedeas Bond to be given by it and fixing the time within which said bond may be filed and that said Order direct the Clerk of this Court not to pay out of the registry of the Court any of the funds of said District to any creditor thereof until the final determination or dismissal of said appeal.

L. C. SMITH and

A. L. COWELL

Attorneys for Anderson-Cottonwood Irrigation District.

[20]

(Duly Verified.)

AUTHORITIES

Subdivision (d), Rule 62, Rules of Civil Procedure.

Subdivision (d), Rule 73, Rules of Civil Procedure.

Subdivision (e), Rule 73, Rules of Civil Procedure.

[Endorsed]: Filed Sept. 21, 1942. [21]

[Title of District Court and Cause.]

ORDER FOR SUPERSEDEAS BOND

Anderson-Cottonwood Irrigation District, the debtor above named having appealed from certain portions of an order made herein on the first day of July, 1942 and having heretofore filed herein a bond for costs on said Appeal and counsel for the parties to said Appeal having prepared and signed an agreed statement, as provided in Rule 76 of the Rules of Civil Procedure, which statement has been approved by this Court, and said District having been allowed until October 1, 1942 to docket said Appeal, and said Appeal having not yet been docketed, and said District desiring a stay on Appeal and having applied to this Court to fix the amount of a supersedeas bond and to fix the time within which said bond may be filed, and the money to pay the creditors of said District in accordance with the interlocutory decree heretofore rendered herein having been deposited with the Clerk of this Court and being in the custody of the Court; now, therefore,

It Is Hereby Ordered that said District may have until [22] and including the 29th day of September, 1942, in which to file herein a supersedeas bond; that the amount of said bond be, and hereby is fixed at \$17,300.00; that said bond be conditioned that said District shall prosecute said Appeal to effect and for the satisfaction in full of the amount due appellee under the provisions of the interlocutory

decree, together with interest and damages for delay, if for any reason the appeal is dismissed or if the aforesaid order is affirmed and for the satisfaction in full of such interest and damages as the appellate Court may adjudge and award, and that until said appeal is finally determined or dismissed, the Clerk of this Court be, and hereby is instructed not to pay any money on deposit in the registry of this Court to any creditor of said District as provided in said interlocutory decree.

Witness our hand this 21st day of September, 1942.

MARTIN I. WELSH,
Judge of the District Court.

[Endorsed]: Filed Sept. 21, 1942. [23]

[Title of District Court and Cause.]

SUPERSEDEAS BOND ON APPEAL

Know All Men by These Presents:

That we, Anderson-Cottonwood Irrigation District, as principal and New Amsterdam Casualty Company a corporation incorporated under the laws of the State of New York, as surety, are held and firmly bound unto J. R. Mason and unto the United States of America and unto the Clerk of the above-entitled Court in the full and just sum of Seventeen Thousand Three Hundred Dollars (\$17,300.00) to

be paid to them, or any of them, or the successors, heirs, executors, administrators, or assigns of any of them, to which payment, well and truly to be made, we bind ourselves and our successors, jointly and severally, by these presents.

Sealed with our seals and dated this 25th day of September, in the year of our Lord One Thousand Nine Hundred and Forty-two. [24]

Whereas, on the First day of July, 1942, in the District Court of the United States for the Northern District of California, Northern Division, in the above-entitled proceeding, a certain order was made against the above-named Debtor, and the said Debtor having filed in said Court a notice of appeal to reverse the said Order on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, at a session of said Circuit Court of Appeals to be holden at San Francisco, in the State of California.

Now, the condition of the above obligation is such, That if the said Anderson-Cottonwood Irrigation District shall prosecute its said appeal to effect, and satisfy in full the amount due the Appellee under the provisions of the interlocutory decree heretofore entered in said proceeding, together with interest and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such costs, interest and damages as the appellate court may adjudge and award, if said District shall fail to make its plea good, then the

above obligation to be void; else to remain in full force and virtue.

[Seal]

ANDERSON-COTTONWOOD
IRRIGATION DISTRICT

By W. W. TREAT,

President of its Board of
Directors.

And ELLIS E. SHARAHAN,

Secretary of said Board.

[Seal]

NEW AMSTERDAM CASUAL-
TY COMPANY

By M. A. BAILEY,

Attorney-in-Fact

Form of the foregoing bond and sufficiency of the surety approved this 28th day of September, 1942.

MARTIN I. WELSH,

Judge of the District Court.

(Acknowledgment of signatures attached hereto.)

[Endorsed]: Filed Sept. 28, 1942. [25]

[Title of District Court and Cause.]

STIPULATION FOR ADDITIONS TO
RECORD ON APPEAL

Anderson-Cottonwood Irrigation District, the debtor above-named, having on the 27th day of July, 1942, filed herein a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit from certain portions of an order made herein

on the 1st day of July, 1942, on motion of J. R. Mason, and the parties to said appeal having stipulated to a statement of the facts essential for the determination of said appeal, which statement has been approved by the Honorable Martin I. Welsh, Judge of the District Court and certain additional matters being necessary to complete the record on appeal and counsel for J. R. Mason having this day for the first time received notice or copies of an Application made by said District herein for an Order Fixing the Amount of and Time to File a Supersedeas bond and directing stay of proceedings and a copy of an Order made herein for a Supersedeas Bond.

It Is Hereby Stipulated by and between counsel for said District and for said J. R. Mason that the Clerk of the above- [26] entitled Court, in preparing the record on appeal, may add to said agreed statement copies of the Stipulation heretofore made by said parties for an Order Extending the time to docket said appeal and of the Order Extending said time and of said Application of said District for an Order concerning a supersedeas bond and of the Order for Supersedeas Bond filed herein September 21, 1942, and of the bond that may be filed pursuant to said Order, and of this Stipulation.

In making this stipulation respondent expressly disclaims any intention to waive any right to deny the propriety, regularity, or legality of said order for said superseades bond, or of said supersedeas bond, or to contest or attach the propriety, regularity, or legality of either of them or the effect thereof,

or to waive any right which respondent has or would have if this stipulation had not been signed; respondent reserves the right hereafter to assert and contend that there is no warrant or authority in law or in equity for said order for said supersedeas bond or for said supersedeas bond, and to take and prosecute such proceeding in the above-entitled matter or in a separate suit, action, or proceeding as respondent may be advised or believe to be appropriate, by motion or otherwise, in this or any other court to strike or annul said supersedeas bond and/or said order for said supersedeas bond.

Dated this 29th day of September, 1942.

L. C. SMITH

A. L. COWELL

Attorneys for Anderson-Cottonwood Irrigation District

W. COBURN COOK

PAUL A. McCARTHY

Attorneys for J. R. Mason

[Endorsed]: Filed Sept. 30, 1942. [27]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK, U. S. DISTRICT COURT, TO TRANSCRIPT ON APPEAL

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing 27 pages, numbered from 1 to 27, inclusive, contain a

full, true and correct transcript of certain records and proceedings in the Matter of Anderson-Cottonwood Irrigation District, No. 7996, as the same now remain on file and of record in this office.

I further certify that the cost of preparing and certifying the foregoing record on appeal is the sum of Five and 00/100 (\$5.00), and that the same has been paid to me by the Attorneys for the Appellant herein.

In Witness Whereof, I have hereunto set my hand and the official seal of said District Court, this 30th day of September, A. D. 1942.

[Seal] WALTER B. MALING,
 Clerk,
By F. M. LAMPERT,
 Deputy Clerk. [28]

[Title of District Court and Cause.]

BOND FOR DAMAGES AND COSTS

Know All Men by These Presents: That we, J. R. Mason, a Creditor of Anderson-Cottonwood Irrigation District, as Principal, and the American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, and authorized to transact business in the State of California, as Surety, are held and firmly bound unto Anderson-Cottonwood Irrigation District, and to the United States of America, and to the Clerk of said Court, in the full and just sum of Five Hundred & 00/100 Dollars (\$500.00), to

be paid to them and/or to each and/or to all or any of them and his or their respective successors, if any, as their respective rights may appear, in the aggregate amount of \$500.00, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 1st day of July, 1942.

Whereas, the above named Principal moved that this Court enter an order suspending certain parts of the Final Decree and said motion was granted by the Court July 1, 1942, upon condition that a bond in the sum of Five Hundred Dollars (\$500.00) be given to secure the Anderson-Cottonwood Irrigation District against damages and costs, and said order further provided that the creditors were to be granted an extension of time to October 31, 1942, within which to deposit their bonds with the Clerk of said Court instead of July 7, 1942 as provided in the Final Decree therein.

Now, Therefore, the condition of the above obligation is such that if the said J. R. Mason shall answer all damages and costs that may be adjudged against the said J. R. Mason in this proceeding, this obligation to be void, otherwise to remain in full force and effect.

J. R. MASON

Principal

AMERICAN SURETY COM-
PANY OF NEW YORK

By R. D. WELDON

Resident Vice-President

Attest:

B. D. SPERRY

Resident Assistant Secretary

Bond No. 725546K. Premium \$10.00 per annum.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

[Seal]

WALTER B. MALING,

Clerk, District Court of the
U. S. Northern District of
California.

By F. M. LAMPERT,

Deputy Clerk

[Endorsed]: Filed Sept. 21, 1942.

[Endorsed]: Received October 14, 1942. Paul P.
O'Brien, Clerk.

[Title of Court and Cause.]

San Francisco, Calif.

1920 Lake St.,

July 3, 1942

The Honorable Clerk,
The District Court of the United States,
Sacramento, California.

Dear Sir:

Herewith there are deposited with you the bonds and coupons issued by Anderson Cottonwood Irrigation District, Shasta and Tehama Counties, Cali-

fornia listed herein which securities are covered in the Matter of Anderson Cottonwood Irrigation District debtor, No. 7996 for which you have been designated Registrar, as follows:

Bonds of First Issue, dated Jan. 1, 1916, denomination \$1.00 each, Nos. 109, 110, 111, 112, 113, 152, 221, 293, 304, 305, 306, 307, 409, 410, 457, 499.

Bonds of Second Issue, dated July 1, 1917, denomination \$1,000 each, Nos. 30, 31, 32, 69, 70, 71, 81, 82, 83, 92, 111, 176, 194, 227, 93, 228, 243, 267, 280, 281, 350, 414, 472, 498, 541.

Coupons appurtenant to the above bonds, also deposited herewith, due July 1, 1931, \$270; Jan. 1, 1932, \$500; July 1, 1932, \$840; Jan. 1, 1933, \$840; July 1, 1933, \$1230 and \$1230 due each six months thereafter to the maturity date of each bond. Certain of the coupons from these bonds, not deposited have been paid by the district, and are therefore not "unpaid" missing coupons, and no deduction should be made on that account, when, as and if the amount offered is accepted by me.

The Circuit Court of Appeals of the U. S., 9th Circuit, on April 18, 1942 signed an order, a copy of which was duly served on counsel for the Anderson Cottonwood Irrigation District, and which order operates to suspend until 60 days after June 1, 1942, any running of time for the deposit of the bonds and coupons contained in the Final Decree. Application has now been made to the District Court to further suspend the running of the time prescribed in the Final Decree until a reasonable time after the Supreme Court of the United States shall

have ruled on the Petition for a Rehearing now submitted to that Court, and pending in it, with regard to this case; this later application will be undoubtedly granted or denied before the expiration of the added time provided by the April 18th order of the Circuit Court of Appeals of the U. S., referred to above.

Because of arguments by counsel for the District, and to prevent possible further controversy and litigation, but under no circumstances conceding that the Final Decree is valid, and without submitting to any of the provisions thereof nor conceding that the order of the Circuit Court of Appeals, as above, or any other order of decree which may be granted does not effectively stay the running of the time or any other provision in the Final Decree signed by the District Court, the above bonds and coupons are being deposited with you now only by reason of the Final Decree herein requiring that the said securities be deposited with you on or before July 7, 1942, and providing in the alternative that if they be not deposited on or before that date the same should be void. No transfer of the title to any bonds or coupons handed you herewith is effected or consented to by this deposit, and I decline to take the money payable by you under the said Final Decree at this time, and protest the said Final Decree in so far as the same is not final but possibly none the less operative, and if as a result of the Petition for a Rehearing the said Final Decree should be reversed, I intend to, and will claim each and every right that I am entitled to under

and by virtue of my ownership or possession of the above listed bonds and coupons, and you shall return to me or my order these securities, on demand.

Respectfully,

J. R. MASON

July 3, 1942

I hereby certify that the annexed instrument is a true and correct copy of the original received in my office.

Attest:

[Seal]

WALTER B. MALING,

Clerk, District Court of the
U. S. Northern District of
California.

By F. M. LAMPERT,
Deputy Clerk

July 3, 1942

Received of J. R. Mason the following bonds of Anderson-Cottonwood Irrigation District; each one Thousand Dollar denomination, in accordance with terms and conditions of his letter of July 3rd, 1942:

First Issue

No. 109 with coupons 53 to 80 incl. attached

110

“

111

“

112

“

113

“

152

“

221

“

293

“

First Issue—(Continued)

304	“	
305	“	
306	“	
307	“	
409	“	
457	with coupons 32 to 40 and 53 to 80 incl.	attached
410	“	“
499	with coupons 53 to 80 incl.	attached

Second Issue

No. 30 with coupons 47 to 80 incl. attached

31	“	
32	“	
81	with coupons 50 to 80 incl.	attached
82	“	
83	“	
92	“	
93	“	
111	“	
194	“	
227	“	
228	“	
243	“	
267	“	
280	“	
281	“	
350	“	
414	“	
541	“	
176	with coupons 29 to 80 incl.	attached
498	“	29 to 36 and 50 to 80 incl. attached
472	“	29 to 36 and 50 to 80 incl. attached
69	“	29 to 37 and 50 to 80 incl. attached
70	“	29 to 38 and 50 to 80 incl. attached
71	“	29 to 37 and 50 to 80 incl. attached

Also received

Nine coupons each face value Thirty Dollars payable 7-1-31

12	“	“	1-1-32
20	“	“	7-1-32
20	“	“	1-1-33

Also received—(Continued)

33	“	“	7-1-33
33	“	“	1-1-34
33	“	“	7-1-34
33	“	“	1-1-35
33	“	“	7-1-35
33	“	“	1-1-36
39	“	“	7-1-36
40	“	“	1-1-37
40	“	“	7-1-37
40	“	“	1-1-38
40	coupons each face value Thirty Dollars payable		7-1-38
40	“	“	1-1-39
40	“	“	7-1-39
40	“	“	1-1-40
40	“	“	7-1-40
37	“	“	1-1-41
37	“	“	7-1-41
37	“	“	1-1-42

WALTER B. MALING,

Clerk

By F. M. LAMPERT,

Deputy Clerk

I hereby certify that the annexed instrument is a true and correct copy of the original.

Attest:

[Seal]

WALTER B. MALING,

Clerk, District Court of the
U. S. Northern District of
California.

By F. M. LAMPERT,

Deputy Clerk

[Endorsed]: Received October 14, 1942. Paul P.
O'Brien, Clerk.

[Endorsed]: No. 10271. United States Circuit Court of Appeals for the Ninth Circuit. Anderson-Cottonwood Irrigation District, Appellant, vs. J. R. Mason, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Northern Division.

Filed October 1, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 10271

ANDERSON-COTTONWOOD IRRIGATION
DISTRICT,

Appellant,

vs.

J. R. MASON,

Appellee.

DESIGNATION OF RECORD TO BE PRINTED
AND STATEMENT OF POINTS ON APPEAL

Appellant above named hereby designates, as the record necessary for the consideration of the Appeal herein, all of the record certified by the clerk of the United States District Court for the Northern Dis-

trict of California, Northern Division, and filed herein October 1, 1942, and hereby adopts as the statement of the points on which Appellant intends to rely on this Appeal, the "Statement of Points" included in the agreed statement of facts in the record certified as aforesaid, which points are as follows, stated independently of the context in said agreed statement:

1. That the District Court had no power to stay the enforcement of said Final Decree beyond the time when the Supreme Court of the United States shall have passed upon Appellee's Petition for Re-hearing of his petition for a writ of certiorari.

2. That the District Court had no power to change the terms of said Final Decree in any manner whatsoever.

3. That said District Court had no power to grant to creditors of Appellant an extension of time to October 31, 1942, within which to deposit bonds with the Clerk of said Court for payment.

Dated: October 2, 1942.

L. C. SMITH

A. L. COWELL

Attorneys for Appellant.

[Endorsed]: Filed Oct. 5, 1942.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD BY APPELLEE

The appellee designates as additional record to be printed herein the following:

1. Form of deposit used by J. R. Mason on deposit of bonds.
2. Receipt given by Clerk to J. R. Mason on deposit of bonds.
3. Bond furnished by J. R. Mason pursuant to order from which this appeal is taken.

PAUL A. McCARTHY,
Attorney for Appellee.

Copy mailed to Attorneys for Appellant Oct. 7, 1942.

[Endorsed]: Filed Oct. 9, 1942.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION FOR CORRECTION OF
RECORD

It Is Hereby Stipulated by and between Appellant and Appellee, above-named, that the "Designation of Record to be Printed and Statement of Points on Appeal", heretofore filed herein by Appellant, may be corrected by changing the figures "13" in line 4 on page 2 of said Designation to "31", so that the date specified in the 3rd point of "Statement of Points on Appeal" may conform to the date specified in the "Statement of Points" set forth on page 15 of the agreed Statement of Facts contained in

the transcript of record filed herein October 1, 1942 and with the corresponding date specified in the Order made July 1, 1942 and set forth on page 12 of said agreed statement.

Dated: October 10, 1942.

L. C. SMITH

A. L. COWELL

Attorneys for Appellant

W. COBURN COOK

PAUL A. McCARTHY

Attorneys for Appellee.

[Endorsed]: Filed Oct. 14, 1942.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION RE RECORD ON APPEAL

It Is Stipulated by and between Appellant and Appellee above-named that the matter required by Appellee in his counter-designation filed herein may be included in the printed transcript of record on appeal herein and that any certificate of acknowledgment attached to the bond specified in Designation No. 3 may be omitted.

Dated October 13, 1942.

L. C. SMITH

A. L. COWELL

Attorneys for Appellant

W. COBURN COOK

PAUL J. McCARTHY

Attorneys for Appellee.

[Endorsed]: Filed Oct. 15, 1942.

8
No. 10,271

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

ANDERSON-COTTONWOOD IRRIGATION
DISTRICT,

Appellant,

VS.

J. R. MASON,

Appellee.

APPELLANT'S OPENING BRIEF.

L. C. SMITH,
Masonic Building, Redding, California,

A. L. COWELL,
Belding Building, Stockton, California,

Attorneys for Appellant.

FILED

NOV 27 1942

PAUL P. O'DRIEN,
CLERK

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No. 10,271

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

ANDERSON-COTTONWOOD IRRIGATION
DISTRICT,

Appellant,

VS.

J. R. MASON,

Appellee.

APPELLANT'S OPENING BRIEF.

This appeal is an outgrowth of a proceeding by Anderson-Cottonwood Irrigation District, hereinafter called "The District" for the confirmation of its Plan of Composition of outstanding indebtedness, filed in the District Court of the United States of the Northern District of California, Northern Division, hereinafter called "The District Court", under what is now chapter IX of the Bankruptcy Act.

Appeals growing out of this proceeding have been before this Court on two separate occasions. The history of the proceeding is summarized in an agreed statement of facts contained in the transcript of record filed herein, which will be referred to in this brief by the initial "R" in parenthesis followed by the page of the transcript to which reference is made.

BASIS OF JURISDICTION.

The facts essential to the jurisdiction of the District Court and of this Court are set forth in the transcript (R pp. 2-27), from which it appears that after Appellee herein and certain other creditors of the district had appealed from the Interlocutory Decree confirming the Plan of Composition, that appeal was dismissed by this Court and that thereafter a Final Decree was entered in the District Court, which is set forth in full in the record (R pp. 3-9).

J. R. Mason appealed from the Final Decree and this Court affirmed it in a proceeding numbered 9951 in this Court. The affirming opinion is set forth in 126 Federal Reporter (2nd series) at page 921.

Thereupon Mr. Mason applied to the Supreme Court of the United States for a Writ of Certiorari to review the decision of this Court (R pp. 16 and 17).

The Supreme Court denied a Writ of Certiorari June 1, 1942 (R p. 17), and the mandate of this Court showing the affirmance of the Final Decree was issued June 6, 1942 (R pp. 17 and 18). An endorsement on the Mandate shows that it was filed and spread upon the minutes of the District Court June 9, 1942 (R p. 19).

Thereafter, Mr. Mason filed in the Supreme Court of the United States, a petition for a rehearing of his petition for a Writ of Certiorari.

On the 29th day of June, 1942, which by an obvious typographical error appears in the transcript as 1924, a motion in behalf of Mr. Mason was made in the

District Court “for an order suspending that part of the Final Decree which provides that the creditors must surrender and deposit their bonds with the Clerk of this Court [meaning the District Court] on or before July 7th, 1942 or be thereafter barred from collecting the amount provided by the Plan of Composition, and ordering that the time be extended until a reasonable period of time after the United States Supreme Court may have passed upon the petition for rehearing” (R pp. 19 and 20).

On July 1, 1942, the District Court made a Minute Order as follows (R p. 22):

“The motion to suspend certain parts of final decree having been heretofore heard and submitted, being now fully considered, it is Ordered that the motion be and the same is hereby granted upon the condition that a bond in the sum of \$500.00 be given to secure the District against damages and costs. It is further Ordered that the creditors are hereby granted an extension of time to October 31st, 1942, within which to deposit their bonds with the Clerk of this Court instead of July 7th, 1942, as provided in the final decree.”

From this Order an appeal was duly taken by the district (R pp. 22-27).

Jurisdiction of the District Court to make any order affecting the Final Decree rests upon the 3rd paragraph of section 350 of title 28 U. S. C., which reads as follows:

“In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execu-

tion and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to apply for and to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of good and sufficient security, to be approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay."

Jurisdiction is conferred upon this Court to hear and determine the appeal from said order of the District Court by Sections 24 and 25 of the Bankruptcy Act, as revised by the Chandler Act of June 22, 1938. It is provided in said Section 24 that when any order, decree or judgment involves less than \$500.00 an appeal therefrom may be taken only upon allowance of the Appellate Court.

This case involves more than \$500.00 because it appears from the receipt given by the Clerk of the District Court to Mr. Mason for bonds deposited with the Clerk (R pp. 44-46) that Mr. Mason owns 41 bonds of the denomination of \$1000.00 each. These bonds were transmitted to the Clerk by Mr. Mason July 3, 1942, but not for payment as required by the Final Decree (R p. 7). That decree provides that any bonds "not so deposited" within one year from

the date of the decree, which was July 7, 1941, "shall thereafter be forever barred from participating in the Plan of Composition or in the funds held in the registry of this Court." Therefore, unless Mr. Mason is protected by the District Court's order of July 1, 1942, he will not receive any payment for his bonds.

It is stipulated at the end of the Agreed Statement (R p. 28) that the transcript of record on appeal in Case No. 9951 in this Court shall be a part of the Record on Appeal herein but need not be reprinted. It appears on page 8 of that record that the district's plan of composition provided for a payment of 30% of the principal of the outstanding bonds of the district with a certain additional payment for interest. Therefore the amount involved in this appeal is much more than \$500.00.

THE ISSUE OF THIS APPEAL.

From the foregoing statement it is obvious that the issue involved in this appeal is simple. *It is a matter of upholding the dignity and authority of this Court.* It may be stated as follows:

After this Court has affirmed a decree and the Supreme Court has denied certiorari and the mandate of this Court has been transmitted to the District Court, has the District Court power to change the decree so that it will no longer be the decree that this Court affirmed?

After the Supreme Court had denied Certiorari, Mr. Mason applied for a rehearing, but the application

was too late for the Supreme Court to pass upon it before the summer recess. Then he applied to the District Court "to suspend" the decree which this Court had affirmed and the District Court thereupon made the order from which this appeal is taken.

Before the Supreme Court had denied Certiorari, application had been made, by affidavit filed in this Court (R. pp. 14 and 15), for an order "suspending the running of the time for the presentation of Appellant's claims", pending the determination of his petition for certiorari.

An order was issued by a Judge of this Court, suspending the running of the time for the Appellant to present his bonds until 60 days after the Supreme Court had "passed upon" Mr. Mason's application for Certiorari. The Supreme Court did pass upon that application by denying it June 1, 1942. Hence this order is now no protection to Mr. Mason even if it were valid. This is Mr. Mason's own view, expressed in a letter to the Clerk of the District Court, in which after referring to this order he said: "which order operates to suspend until 60 days after June 1, 1942, any running of time for the deposit of the bonds and coupons" (R. p. 42).

We respectfully suggest, however, that under Section 350 of Title 28, U. S. C., an order staying the execution of a decree in order that one may apply for a Writ of Certiorari must be made by a Judge of the Court that issued the decree or by the Supreme Court. We have searched in vain for any other authority to stay a decree.

SPECIFICATION OF ERRORS AND POINTS ON APPEAL.

While the appeal really presents but one issue, we have stated in our designation of points on appeal (R. pp. 47 and 48) three points on which we rely. They imply three errors by the District Court in making the order from which we have appealed. These points are as follows:

1. That the District Court had no power to stay the enforcement of said Final Decree beyond the time when the Supreme Court of the United States shall have passed upon Appellee's Petition for Rehearing of his petition for a writ of certiorari.

2. That the District Court had no power to change the terms of said Final Decree in any manner whatsoever.

3. That said District Court had no power to grant to creditors of Appellant an extension of time to October 31, 1942, within which to deposit bonds with the Clerk of said Court for payment.

ARGUMENT.

- I. **THE DISTRICT COURT'S POWER WAS LIMITED TO STAYING THE ENFORCEMENT OF THE FINAL DECREE FOR A REASONABLE TIME TO ENABLE MR. MASON "TO APPLY FOR AND TO OBTAIN" A WRIT OF CERTIORARI.**

The wording of Section 350 of Title 28, U. S. C., above quoted, is peculiar. It does not authorize a stay merely to enable a litigant *to apply* for certiorari, but "to apply for *and obtain*" such a writ. Obviously if

the writ is not obtained, the decree again becomes effective.

There were two provisions of the Final Decree in this case that could be affected by the stay authorized by the statute. One was the bar by which Mr. Mason was prevented from participation in any funds in the registry of the Court if he had not presented his bonds for payment by July 7, 1942. The other was the requirement that the Clerk notify the Reconstruction Finance Corporation after the expiration of twelve months of the amount of money remaining in the registry of the Court and that it was available for the purchase of bonds of the District held by that corporation (R pp. 7 and 8). A proper order would have stayed the enforcement of these provisions to allow Mr. Mason to obtain a writ of certiorari. If he had obtained the writ, of course, the whole matter would have been transferred to the Supreme Court, and if that Court had modified the decree on review and had not affirmed the original time limit, Mr. Mason's rights to whatever benefits the modified decree gave him would have been preserved notwithstanding his failure to comply with the decree in its original form, for the bar of the decrees would have been stayed until certiorari was granted.

However, we have a letter from the Clerk of the Supreme Court, dated October 12, 1942, *stating that the Court had that day denied Mr. Mason's petition for a rehearing* (See also 63 S. Ct. 34). Thereupon the bar of the decree forthwith became effective as of the date fixed therein, and it would have been the Clerk's

duty to send notice to the Reconstruction Finance Corporation, as provided in the decree. However, to preserve the status quo pending the determination of this appeal, we filed in the District Court a supersedeas bond (R pp. 34-36) and in the order for that bond the District Court directed the Clerk not to pay out any money from the registry of the Court to any creditor of the District until this appeal "is finally determined or dismissed" (R p. 34).

If the decree had been for the foreclosure of a mortgage on the Appellee's home, it is obvious that the District Court could have stayed the foreclosure to enable Appellee "to apply for and obtain" a writ of certiorari to review the decree, but if he failed to obtain the writ, the decree would forthwith become effective and the foreclosure would be carried through with as little delay as possible. Likewise in this case Mr. Mason's failure to convince the Supreme Court that he was entitled to a review of the Final Decree herein means that the decree is in full force and effect, and, as he did not deposit his bonds for payment before July 7, 1942, *he is barred from participation in any funds in the registry of the Court.*

The only tribunal having authority to *change* any provision of the Final Decree was the Supreme Court of the United States, but under Section 350 of Title 28, U. S. C., above quoted, the District Court had authority to stay the enforcement of the decree to enable Mr. Mason "to apply for and to obtain" a writ of certiorari. Since he did not obtain the writ, he obviously became subject to all the provisions of the Decree.

There is no authority given to the District Court to "suspend" a decree that has been affirmed by this Court in order that one may apply for a Writ of Certiorari and, if he fails to obtain it, may escape the decree. The law does not contemplate that one may thus eat his cake and have it.

Mr. Mason must have known when he applied to the Supreme Court for a rehearing that he was in an extremely precarious position. Rehearings of petitions for certiorari are rarely granted by that Court. He had such faith in his petition that he took the chance that it might ultimately be granted, but he failed.

The motion in the District Court (R pp. 19 and 20) was for an order "suspending" that part of the Final Decree which provided that creditors must deposit their bonds with the clerk before July 7, 1942, and for an order extending the time until a reasonable period after the Supreme Court had passed upon the petition for rehearing. The granting of this motion was obviously in excess of the limited power conferred on the District Court by Section 350 of Title 28, U. S. C., which provides only for a *stay of the enforcement* of the Decree until a writ of certiorari could be *obtained*. The District Court undoubtedly had power to issue a stay that would have prevented the Clerk from notifying the Reconstruction Finance Corporation that he had some money available for the purchase of bonds until the motion for rehearing had been passed upon, but when that motion was denied the Final Decree again became effective and barred Mr. Mason from participation in the Plan of Composition or in any funds in the registry of the Court.

The stay authorized by statute is for a particular purpose, and when that purpose fails, the decree again becomes effective.

Mr. Mason might have been in a better position if he had applied to this Court for a stay of the Mandate, as was done in the case entitled

In re Woods, 143 U. S. 202, 12 S. Ct. 417, 36 L. Ed. 125.

This he did not do, and after the mandate was issued, as we shall see hereafter, the Judgment of this Court became binding on the District Court, subject only to the limited statutory power of that Court to stay the enforcement of the decree for one purpose only.

II. THE DISTRICT COURT HAD NO POWER TO CHANGE THE TERMS OF THE FINAL DECREE IN ANY MANNER WHATSOEVER.

It would seem that this proposition would need no argument. After this Court had refused absolutely to modify the provision in the Final Decree requiring all bonds to be deposited for payment by July 7, 1942, and had issued its mandate expressly declaring that the Decree be affirmed, we can think of no theory to justify the District Court in substituting its judgment for the deliberate judgment of this Court, which it did by ordering "that the creditors are hereby granted an extension of time to October 31st, 1942, within which to deposit their bonds with the Clerk of this Court, instead of July 7th, 1942, as provided in the Final Decree".

The principle applicable to the case was thus stated in

Sprague v. Ticonic National Bank, 307 U. S. 161, 59 S. Ct. 777, 83 L. Ed. 1184:

“The general proposition which moved the Court—that it was bound to carry the mandate of the upper Court into execution and could not consider questions which the mandate laid at rest—is indisputable.”

In that case, however, the matter which came before the Supreme Court was the allowance of counsel fees, which was held to be a matter supplemental to the original proceeding and on which the District Court was not bound by the mandate. In this case, however, the order of the District Court sets a new limit for the deposit of bonds, notwithstanding the fact that this Court refused after due deliberation, to modify the limit set in the Final Decree.

In support of the general proposition above stated, the Supreme Court cited

Kansas City Southern Railway Company v. Guardian Trust Company, 281 U. S. 1, 74 L. Ed. 659, 50 S. Ct. 194;

holding squarely that, after an appeal from a judgment, the lower Court is without power to modify the judgment but can only carry out the mandate of the upper Court regarding the judgment when such mandate is received. The language of the Court was positive and clear. It was as follows:

“The mandate required the execution of the decree. *The District Court could not vary it or give any further relief.*” (Emphasis ours.)

Among the cases cited in support of this statement is

Ex Parte The Union Steamboat Company, 178
U. S. 317, 319, 44 L. Ed. 1084, 1085, 20 S. Ct.
904,

in which there is a quotation from

Ex Parte Sibbald v. United States, 12 Pet. 488,
492,

where the duty of an inferior Court upon receiving the mandate of a higher Court is thus defined:

“Whatever was before the court and is disposed of is considered as finally settled. The inferior court is bound by the decree as the law of the case and must carry it into execution according to the mandate. They cannot vary it or examine it for any other purpose than execution; or give any other or further relief; nor review it upon any matter decided on appeal, for error apparent, nor intermeddle with it further than to settle so much as has been remanded.”

This is in line with the general rule stated in Freeman on Judgments, 5th Edition, Section 205, where it is said:

“It has been frequently held that when an appeal is perfected, the trial court loses jurisdiction and control of its judgments, at least so far as any right to vacate or set them aside is concerned.”

This is supported by the citation of Federal and California cases and numerous cases from other jurisdictions.

Furthermore, it was held in a very early case,
Albers v. Whitney, Fed. Cas. No. 137,

that the power of the Court to amend judgments is dependent upon statute and Section 32 of the Judiciary Act of 1789 was quoted as limiting the power of the Court. This section is substantially the same as has been incorporated into the Judicial Code as Section 777 of Title 28 U. S. C. A. authorizing the correction of defects and want of form in judgments. Accordingly, it was said in the *Albers* case:

“No authority is given to the courts of the United States to make any amendments of judgments except as to defects and want of form.”

Rule 34 of the Supreme Court Rules states that no mandate issues upon the denial of a petition for writ of certiorari, but whenever such a writ is denied, the Clerk must enter an order to that effect and forthwith notify the Court below and counsel of record. Upon the denial of the writ of certiorari, a certified copy of the order denying the writ was transmitted to the Clerk of this Court, and thereupon the mandate of this Court affirming the final decree was transmitted to the District Court. Therefore, the District Court could not do otherwise than enforce the final decree, subject to its limited right to stay its enforcement.

It would be an anomaly in judicial procedure if the District Court could modify a decree after it had been affirmed on appeal and the Supreme Court had denied certiorari, merely because the Appellant had indicated his displeasure at the action of the Supreme Court by a petition for rehearing.

III. THE DISTRICT COURT HAD NO POWER TO GRANT TO CREDITORS AN EXTENSION OF TIME TO OCTOBER 31, 1942, WITHIN WHICH TO DEPOSIT BONDS WITH THE CLERK OF THAT COURT FOR PAYMENT.

This follows from the cases cited in support of our second point and from the very nature of the situation with which the District Court was confronted.

The decisions of this Court are *final*, subject only to review by the Supreme Court. That review, in cases of this kind is by Writ of Certiorari, which, as stated in Rule 38 of the Supreme Court Rules, "*is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor*".

In this case the matter of the 12-months limitation in the Final Decree for the deposit of bonds was not overlooked by this Court. It was shown in the opinion affirming the Final Decree that counsel for Mr. Mason distinctly raised the question of the propriety of that limit in one of the specifications of error which was filed on his behalf in the District Court, *but in the opening brief the point was not mentioned*, and we therefore assumed that it had been abandoned. An attempt was made to revive the point at the oral argument on the appeal and we objected. In its opinion affirming the final decree this Court said:

"Our Rule 20, subdivision 2(d), provides that the brief shall contain 'a specification of errors relied upon, which shall be numbered and shall set out separately and particularly each error intended to be urged'. In view of the failure to specify the point or to argue it in the brief, the alleged error will not be considered."

This Court thereupon affirmed the Final Decree with the time limit, which Mr. Mason later found to be so inconvenient. If this Court was justified in thus upholding its rules, why should the District Court not be held to an equal respect for them?

It has been suggested that the limitation is unreasonable and was inserted by Judge Louderback in the decree by inadvertence. This is contradicted by the fact that counsel for Mr. Mason endorsed on the decree as proposed by counsel for the District his disapproval on the specific ground, among others, that it provided for a time limit for the deposit of bonds "which is not within the scope of section 83 of the Bankruptcy Act" (R p. 10). He did not rest on this objection, but followed it up by submitting to the judge a substitute for the proposed Final Decree from which any time limit for the deposit of bonds was eliminated (R pp. 10-13), and further filed in the District Court a memorandum, in which he distinctly made the point that there was no provision in the statute for such a time limit, and that, if any limit was to be imposed, it should not be less than four years (R pp. 13 and 14).

It cannot therefore be urged that the Final Decree with the time limit was inadvertently signed.

We then have the situation of a decree deliberately signed and entered and duly appealed from and deliberately affirmed by this Court with full knowledge that it contained the time limit. It thus became, as was said in

Ex parte Sibbald v. United States (supra),
 "the law of the case".

The Supreme Court has twice refused a Writ of Certiorari to review this decision, and it stands as the final judgment of this Court, which under the circumstances is the Court of last resort.

Under what theory then has the District Court power to make an order granting the creditors "an extension of time to October 31st, 1942, within which to deposit their bonds with the Clerk of this Court *instead of July 7th, 1942 as provided in the final decree?*" (Emphasis ours.)

That is not a stay, or even a suspension of the decree. It is a plain change in one of its essential terms. It is in effect saying to this Court that the decree as affirmed contained a time limit that is too short and so it must be changed from July 7th to October 31st, notwithstanding that it has become the law of the case.

To reverse this order and uphold the doctrine of the finality of decrees of this Court may operate harshly on Mr. Mason, but it is more important to vindicate the authority of our Courts of last resort than to please an individual who took a chance on the "sound judicial discretion" of the Supreme Court and failed.

It was said in

Calef v. Parsons, 48 Ill. App. 253, 258:

"The Court had judicially determined that matter, and, whether right or wrong, such determination was conclusive as long as it was permitted to remain without amendment. No other rule would enable one to deal safely with property subject to judgment lien."

It is an ancient maxim that Equity follows the law, and it does so whether the law be established by Statute or judicial decree, if the establishment is conclusive. Thus in

Van Dyke v. Arizona Eastern R. Co., 18 Ariz.
220, 157 Pac. 1019,

it was said:

“A railroad right of way fixed by law at a certain number of feet on each side of the track cannot be reduced merely because equitable considerations would seem to entitle adjoining landowner to a portion of such right of way.”

This is equally true of a final adjudication by a Court of competent jurisdiction, particularly where the question litigated has been the subject of an appeal. Thus it is said in

4 *Corpus Juris*, p. 1213:

“It is a general rule that the decision of an appellate Court is the law of the case in further proceedings in the cause in the trial Court.”

On page 1214 of the same volume it is further said:

“The rule is especially applicable where the Court has remanded the cause with specific directions as to the steps to be taken by the lower Court.”

The matter of the time limit was an essential part of the Final Decree in question here. Because the objections to it were not properly taken under the rules of this Court, the decree was affirmed. Thus it was the solemn adjudication of this Court that Mr. Mason must deposit his bonds with the Clerk of the District Court for payment by July 7, 1942, or be

forever barred from participation on any funds in the registry of the Court. The change in this date to October 31st by the District Court was clearly unauthorized and was error.

Mr. Mason deposited his bonds with the Clerk July 3, 1942, but not in compliance with the Final Decree (R pp. 41-46). In transmitting the bonds he wrote a letter, dated at San Francisco July 3, 1942, in which he said (R p. 43):

“No transfer of the title to any bonds or coupons handed you herewith is effected or consented to by this deposit, and I decline to take the money payable by you under the said Final Decree at this time, and protest the said Final Decree insofar as the same is not final but possibly none the less operative, and if as a result of the Petition for Rehearing the said Final Decree should be reversed, I intend to, and will claim each and every right that I am entitled to under and by virtue of my ownership or possession of the above listed bonds and coupons, and you shall return to me or my order these securities on demand.”

The clerk's receipt for these securities (R pp. 44-46) is also dated July 3, 1942. It acknowledges receipt of the bonds and coupons “in accordance with the terms *and conditions*” of Mr. Mason's letter of July 3rd.

This deposit of course was far from a compliance with the Final Decree. It provided (R p. 7) that \$24,799.14 paid into the registry of the Court by the Disbursing Agent, whose report is approved by the decree, shall be disbursed “for the purpose of taking

up and retiring and refinancing, in accordance with the plan of composition approved in this cause, such remaining outstanding old obligations of the petitioning district as are affected by the plan of composition, and which may be presented to the registrar *for that purpose*, within the period of twelve months from the date hereof”.

Mr. Mason's bonds and coupons were “old obligations” of the District, and the money to pay for them in accordance with the plan of composition was included in the Disbursing Agent's deposit in the registry of the Court.

It was further provided in the Final Decree that all the old obligations which are not “so presented”, which clearly means *presented for payment*, within 12 months from the date of the decree shall “thereafter be forever barred from participating in the plan of composition or in the funds held in the registry of this Court”.

There is something else in the Final Decree which Mr. Mason evidently overlooked when applying to the District Court for the order “suspending that part of the Final Decree which provides that the creditors must surrender and deposit their bonds with the Clerk of this Court on or before July 7, 1942, or be thereafter barred from collecting the amount provided by the plan of composition, and ordering that the time be extended” (R pp. 19 and 20). That was the provision (R pp. 8 and 9) that all the old obligations of the District affected by the plan of composition, whether heretofore surrendered and cancelled

or remaining outstanding, and by whomsoever held, are by the decree "cancelled, annulled and held for naught as enforceable obligations" of the District, except as in the decree provided, and their holders were "forever restrained and enjoined" from asserting any claim or demand whatsoever therefor, except as provided in the decree.

Therefore the bonds of Mr. Mason *are now worthless unless the decree be changed*, and we have shown that the Supreme Court is the only tribunal having power to change it, and that Court has declined to do so.

For the reasons herein set forth we believe the order appealed from should be reversed and that the District Court should be directed to instruct its Clerk to notify the Reconstruction Finance Corporation of the amount of money remaining in the registry available for the purchase of new bonds of the District held by that corporation, and otherwise to proceed to carry out the Final Decree.

Dated, Stockton, California,
November 27, 1942.

Respectfully submitted,
L. C. SMITH,
A. L. COWELL,
Attorneys for Appellant.

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No. 10,271

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

ANDERSON-COTTONWOOD IRRIGATION

DISTRICT,

VS.

J. R. MASON,

Appellant,

Appellee.

BRIEF FOR APPELLEE.

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FILED

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PAUL P. O'BRIEN,
CLERK

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No. 10,271

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

ANDERSON-COTTONWOOD IRRIGATION

DISTRICT,

VS.

J. R. MASON,

Appellant,

Appellee.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

J. R. Mason, the appellee in this case, is a creditor of the Anderson-Cottonwood Irrigation District, holding bonds in the amount of \$41,000 with unpaid interest from 1931. (R. 42 and R. 15, case No. 9951.) The appellant, a public agency, obtained an interlocutory decree declaring its plan of composition fair and reasonable. The plan provided for payment of thirty per cent of principal plus certain interest. (R. 46, 50, case No. 9951.)

Mr. Mason's appeal from the interlocutory decree was dismissed. (R. 2 and R. 202, case No. 9951.)

This decree in effect gave an option to the District to deposit its funds and thus be released from its

obligations under the old bond issues. These funds were deposited and a final decree to that effect obtained by the Court. (R. 3-9.) Mason appealed from the final decree. The final decree had a clause which provided (R. 7) that creditors' bonds must be deposited with the Registrar of the Court within a period of twelve months, which period would expire on July 9, 1942, or be forever barred from participating in the plan. Mason's appeal was decided against him. (126 Fed. (2d) 921, 63 S. Ct. 24.) Thereafter he petitioned the United States Supreme Court for a writ of certiorari (R. 21) and at that time applied to this Court for an order suspending the running of the 12 months' period in order to enable him to apply to the U. S. Supreme Court for a writ. This was granted. (R. 16.)

The U. S. Supreme Court denied the application for a writ, and Mason filed a petition for rehearing. (R. 21.) The Court went into recess, and it was not possible therefore to obtain a decision before the 1942 session of the Court in October. Being fearful of the possibility that the order of this Court suspending the running of the time might not be effective under these circumstances, Mason applied to the District Judge for an order suspending the running of the time. (R. 19.)

On July 1, 1942, Judge Welsh granted the motion and ordered suspension of that part of the decree: "It is further Ordered that the creditors are hereby granted an extension of time to October 31st, 1942, within which to deposit their bonds with the Clerk

of this Court, instead of July 7th, 1942, as provided in the final decree." (R. 22.) This appeal is from that order.

A motion to amend a supersedeas order and to require the clerk below to pay appellee from the fund on deposit will also be considered by this Court with this appeal.

SUMMARY OF ARGUMENT.

Appellee will not in his reply brief follow precisely the outline of the argument in appellant's brief, but will divide his argument into four sections:

1. There is no merit in the appeal. Judge Welsh properly granted the order extending time.

2. The question presented is moot because of the order of Judge Healy extending the time for deposit of the bonds.

3. The appeal presents a moot question because Mason has already deposited his bonds within the period of time prescribed and motion of appellee should be granted.

4. The appeal was not properly taken and should be dismissed.

Appellant seeks to demonstrate that the order appealed from was not a stay authorized by Section 350, Title 28, U. S. C. A., but is a modification in substance of the decree which became final after appeal.

5. The appeal, and the proceeding in the Supreme Court for Writ of Certiorari extend the twelve months' time limit.

At page 17 of its brief, appellant says:

“That is not a stay, or even a suspension of the decree. It is a plain change in one of its essential terms. It is in effect saying to this Court that the decree as affirmed contained a time limit that is too short and so it must be changed from July 7th to October 31st, notwithstanding that it has become the law of the case.”

This position cannot be sustained. The decree said Mason must deposit the bonds within 12 months or be forever barred. (R. 7.) The Court's order *stayed* that provision. It said in effect that part of the decree is stayed for a reasonable period to permit Mason to apply for and obtain a writ of certiorari from the United States Supreme Court.

5. The appeal, and the proceeding in the Supreme Court for Writ of Certiorari extend the twelve months' time limit.

ARGUMENT.

I. THERE IS NO MERIT IN THE APPEAL. JUDGE WELSH PROPERLY GRANTED THE ORDER EXTENDING TIME.

Title 28, U. S. C., Section 350, gives specific authority to the District Court to stay for a reasonable time the execution and enforcement of a judgment “to enable the party aggrieved to apply for and obtain a writ of certiorari from the Supreme Court.” The exact language is:

“In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execu-

tion and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to apply for and to obtain a writ of certiorari from the Supreme Court. The stay may be granted by a judge of the court rendering the judgment or decree or by a justice of the Supreme Court, and may be conditioned on the giving of good and sufficient security, to be approved by such judge or justice, that if the aggrieved party fails to make application for such writ within the period allotted therefor, or fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other party may sustain by reason of the stay."

The burden of appellant's argument contained in pages 7 and 8 of his opening brief seems to be that the words in this statute "to apply for and obtain" imply that if the petitioner who seeks a writ of certiorari from the United States Supreme Court fails in his efforts to obtain a writ the decree becomes effective. By this, appellant means that if in the instant case, or any other case where running of time is involved, the time has run before the denial of the original petition for writ of certiorari, and the petitioner fails to obtain his writ, it then becomes too late to comply with the provisions of the decree and a forfeiture occurs. Appellant's argument applies equally to the original application for writ of certiorari as it does to an application for a rehearing.

One simple answer to this is that so interpreted, the statute is meaningless, because obviously if the

petitioner does obtain his writ and wins out in his case before the Supreme Court, he has the relief anyway. So it seems clear that the purpose of the statute is to enable the Supreme Court or the Court below (and not the intermediary Court of course) to stay the running of time or the enforcement of the decree to give the applicant the opportunity to demonstrate, if he can, errors in the decree.

Appellant has been able to produce no case which even hints the interpretation placed upon this statute by appellant.

In *Keyes v. U. S. Fidelity & Guaranty Co.*, 44 Fed. Sup. 723, it was held that stay of enforcement of the judgment of the District Court which had been affirmed by the Circuit Court of Appeals pending application for writ of certiorari could properly be made to the District Court.

This is a matter within the discretion of the judge. *Fidelity and Deposit Co. of Maryland v. Davis*, 127 Fed. (2d) 780.

The case of *In re Woods*, 143 U. S. 202, 12 S. Ct. 417, cited by appellant, does not seem to be in point, as that is a case in which the mandate of the Circuit Court was stayed to enable plaintiffs in error to apply to the Supreme Court for writ of certiorari.

What appellee has been concerned with has been the effect of the time provision in the final decree, should the final decree eventually be enforceable and be not set aside by the Supreme Court on the application for writ of certiorari and petition for rehearing thereof.

Simpkins Federal Practice, Revised Edition, 1934, Sec. 1036, states that where the petitioning party believed the issuance of the mandate or the execution or enforcement of the judgment would cause hardship while the application is being prepared or is pending, it is necessary for him to obtain a stay order as specifically provided in the statute, and refers to Title 28, Section 350.

It is good and proper practice to apply to the District Court for a stay of the proceedings on a mandate after the Supreme Court has denied the petition for writ of certiorari.

“The Appellate Court is reluctant to stay the issuance of a mandate after petition for writ of certiorari has been denied. An application for stay of proceedings on the mandate may be made to the trial Court upon the filing of the mandate.”

Manual of Federal Appellate Procedure, 3rd Edition, 1941, O'Brien, page 239.

*Appellee believes Section 350 contains in its own language a complete answer to this appeal, for it is provided that the Judge of the District Court may make the stay conditional upon giving a bond, which may provide “that if the aggrieved party * * * fails to obtain an order granting his application, or fails to make his plea good in the Supreme Court, he shall answer for all damages and costs which the other parties may sustain by reason of the stay.” This shows quite clearly that Section 350 contemplates that a stay may be obtained for the benefit of the person who applies for but FAILS TO OBTAIN a writ of certiorari.*

It seems unnecessary to cite authority to show that a petition for rehearing of a petition for writ of certiorari is an application for writ of certiorari.

Rule 33 of the U. S. Supreme Court provides for petitions for rehearing.

Section 6 of Rule 38, Rules of the Supreme Court, provides:

“Section 8 (d) of the Act of February 13, 1925 (28 U.S.C.A. Sec. 350), prescribes the mode of obtaining a stay of the execution and enforcement of a judgment or decree pending an application for review on writ of certiorari. The stay may be granted by a judge of the court rendering the judgment or decree, or by a justice of this court, and may be conditioned on the giving of security as in that section provided. (See Rule 36.)”

II. THE QUESTION PRESENTED IS MOOT BECAUSE OF THE ORDER OF JUDGE HEALY EXTENDING THE TIME FOR DEPOSIT OF THE BONDS.

Judge William Healy made an order on April 16, 1942, providing that the time of presentation of Mason's bonds to the registrar pursuant to the final decree be suspended for a period of 60 days after the U. S. Supreme Court shall have passed upon Mason's application for writ of certiorari. (R. 16.) It may well be that the question before this Court is moot on account of the order of Judge Healy, and that Mr. Mason had until 60 days after the denial of his petition for rehearing on his writ, which de-

nial was dated October 12, 1942, within which to deposit his bonds under Judge Healy's suspension of the 12 months' period. If that is so, then the appeal from the order of Judge Welsh extending Mason's time presents a moot question.

However, it can be seen that Mr. Mason could not rely upon the effect of Judge Healy's order since subsequently thereto the mandate of this Court was issued confirming the final decree. (R. 17.)

Consequently, appellee, as a proper precaution, applied to the Judge of the District Court for an order suspending the running of the time. It was a logical conclusion that the mandate having gone down in the Circuit Court, the matter was no longer pending there but was pending before the District Judge.

Furthermore, it does seem that it was better practice to obtain a new order from the District Judge in view of 28 U. S. C. A. Section 350.

III. THE APPEAL PRESENTS A MOOT QUESTION BECAUSE MASON HAS ALREADY DEPOSITED HIS BONDS WITHIN THE PERIOD OF TIME PRESCRIBED, AND THE MOTION OF APPELLEE TO MODIFY THE SUPERSEDEAS ORDER AND TO REQUIRE THE CLERK OF THE COURT BELOW TO PAY MASON SHOULD BE GRANTED.

This matter was presented to the Court on December 21, 1942, by motion. For convenience of the Court the motion, affidavit and points and authorities presented by movant are set forth in an appendix to this printed brief. (See appendix.)

The order of the Court provided that this motion would be considered by the Court simultaneously with this appeal.

Appellee presents one further authority on the question of alternative relief, namely, *U. S. v. Kales*, 62 S. Ct. 214, 314 U. S. 186, 86 L. Ed. confirming 115 Fed. (2d) 497, a case in which it was held that the principle of alternative relief applies to a tax refund claim.

Briefly reviewing the argument on the motion:

(a) If the order suspending the running of the 12 months' period had never been made the deposit of Mason's bonds was good anyway.

(b) The supersedeas order goes further than a reversal of the order appealed from would have gone, for the order for supersedeas bond signed by Judge Welsh provided that "the Clerk of this Court be, and hereby is instructed not to pay any money on deposit in the Registry of this Court to any creditor of said district as provided in said Interlocutory Decree." Thus, Judge Welsh's order even suspends the operation of the interlocutory decree which became final months before the final decree was even signed. (R. 34.)

(c) The appeal taken by appellant from the order extending the time of deposit may not even decide the question presented by the motion as to whether the clerk should pay Mason.

(d) The order is retrospective.

(e) Mason's deposit was good under the rule permitting application for alternative relief.

(f) Mason deposited his bonds. He says: "Here-with there are deposited with you * * *." (R. 41.) He says: they "are being deposited with you now only by reason of the Final Decree herein requiring that said securities be deposited with you on or before July 7, 1942." (R. 43.) He merely says: "I decline to take the money payable by you under the said Final Decree at this time, and protest the said Final Decree." The final decree does not say the bonds must be deposited and also paid for before July 9, 1942.

The record does not show what has occurred subsequently, but I presume it will be undisputed that Mason has now sought payment since the denial of his petition for rehearing by the Supreme Court in the following communication:

"1920 Lake Street.
October 19, 1942.

In the *matter of Anderson-Cottonwood I.D.*
Debtor. No. 7,996.

To the Honorable Clerk,
The District Court of the United States,
Sacramento, Cal.,

Dear sir:

Referring to my letter and deposit of certain bonds and coupons of the above named debtor with you, dated July 3, 1942 and your receipt of the same date, the Supreme Court of the United States having denied my petition for a rehearing in this matter on October 12, 1942, kindly accept this as your authority to deliver the bonds and coupons and surrender them to the debtor against their payment as provided in the plan of compo-

sion with funds deposited with you, remitting the settlement direct to me, at the above address.

It is my belief that any so-called 'missing' coupons from these bonds should not be deducted for from the composition figure, for the reason that they are in the possession of the debtor, and are therefore *not* unpaid. I request that you check this detail, before accepting any deduction on account of any so-called 'missing' coupons. Obviously any coupon which became due prior to July 1, 1937 and which is now in the possession of the debtor can not be 'appurtenant' to the bonds at the time of their delivery to you, no matter how the debtor came into their possession, or when. The same would apply regardless of the due date of any coupon, now in the possession of the debtor. I do not say that there may not be a few coupons for which the deduction set down in the plan should not be made, where the debtor denies that they are in its possession or under its control already.

The reservation about taking the money contained in my deposit with you of July 3, 1942 is now withdrawn, and prior to the date of October 31, 1942 contained in the order granting an extension of time in this case, signed by your Court on July 1, 1942. But no transfer of title to any of the bonds or coupons listed in your receipt is affected or consented to, until and unless payment therefor is received by me, as above.

Respectfully,

J. R. Mason."

The motion should be granted.

IV. THE APPEAL WAS NOT PROPERLY TAKEN AND
SHOULD BE DISMISSED.

Section 24 of the Bankruptcy Act of 1938 seems on its face to be broad enough to permit any appeal of the type here taken.

However, it is submitted that this is a case for dismissal of the appeal. Section 24 was not intended to permit an appeal from an order of the type here given.

The principle reason urged is that the order below was discretionary, and that unless an abuse of discretion is shown, appeal will not lie.

We refer to the following cases:

Hoehn v. McIntosh, 110 Fed. (2d) 200.

The Court declared:

“Before reviewable, administrative orders must have a certain degree of finality. The salutary purpose of the legislation would be destroyed if every order, no matter how trivial, were subject to review. The Act does not contemplate tying up the estate and prolonging administration by appeals, unless the subject has been finally disposed of in the lower court and practically nothing remains to be done in that respect, so that rights may be definitely determined by review.”

So it has been held that an order to remove a referee is not appealable except for abuse of discretion. *Birch v. Steele*, 165 Fed. 577.

An order refusing to reopen an estate was not appealable. *Matter of Graff and Nevins*, 250 Fed. 997.

See also:

Woodford v. Cosden & Co., Inc., 289 Fed. 67;
Matter of Chotiner, 218 Fed. 813.

An order granting or denying a stay after adjudication under Section 11(a) was not appealable. *In re Lesser*, 99 Fed. 913.

And see generally *Collier on Bankruptcy*, 14th Ed., Sec. 24.39, Vol. 2, p. 788, where the author declares:

“It seems evident that before even an interlocutory order is appealable it must have the character of a formal exercise of judicial power affecting the asserted rights of a party; that is, it must substantially determine some issue, or decide some step in the course of the proceeding.”

(See, however, *Albin v. Cowing Pressure Relieving Joint Co.*, 63 Sup. Ct. 170.)

Of course, in a case where abuse of discretion is an issue, it may be said that the Court may determine the appeal or decide that there is no abuse of discretion and dismiss, but if there is no abuse of discretion, then it seems clear there is no jurisdiction to hear the appeal.

V. THE APPEAL, AND THE PROCEEDING IN THE SUPREME COURT FOR WRIT OF CERTIORARI, EXTEND THE TWELVE MONTHS' TIME LIMIT.

11 U. S. C. A. Section 403 (e) provides that when an appeal is taken from the interlocutory decree, if the decree prescribes a time within which any action is to be taken, the running of such time is suspended dur-

ing an appeal until final determination thereof. There is no such provision in the Municipal Bankruptcy Act as to any time prescribed by the final decree, but it would appear that the same principle should apply.

CONCLUSION.

The appellee, J. Rupert Mason, has been before this Court as an appellant in a considerable number of cases involving the Municipal Bankruptcy Act. It might be said that he has been a persistent litigator of the issues raised by this new legislation. Perhaps his persistence is easily understood since he has been one of the pioneers in developing irrigation in this state. It has been his chief life interest. He, through himself and his business associates, has secured the underwriting of approximately, if not more, than 50% of the original irrigation district bond issues issued by the various irrigation districts of this state. Preaching for a lifetime the indestructibility of those bonds. He naturally has sought to defend them, not for his own pecuniary gain but to sustain the principle upon which his life work was built.

In this case, however, he finds himself the appellee. It would seem that the appellant, representing as it does a portion of the great irrigation system of the State of California, being a public corporation representing public interests, should have been content with its decree compelling creditors to receive less than one-third on the dollar of their investment. Not so, however. This appellant is willing to go to

any lengths to prevent creditors from receiving anything. In this the R.F.C. joins heartily. Mr. Mason has been called a part of a recalcitrant minority, a shylock; all the names in the catalogue have been applied to him, and this appeal, no doubt, is a method of seeking to punish him for his persistence in upholding those constitutional principles in which he believes.

The appeal, however, seems totally without merit and it is respectfully submitted that it should be dismissed, and the Clerk of the Court required to pay Mr. Mason on his bonds and coupons pursuant to the interlocutory decree.

Dated, Turlock, California,

January 4, 1943.

Respectfully submitted,

PAUL A. MCCARTHY,

W. COBURN COOK,

Attorneys for Appellee.

(Appendix Follows.)

Appendix.

.

Appendix

(Consisting of Movant's Papers on Motion to Amend "Order for Supersedeas Bond" and to Require Payment to Creditor.)

[Title of Court and Cause.]

MOTION.

J. R. Mason, appellee, moves this court for an order setting aside that part of the order of the District Court entitled "Order for Supersedeas Bond" which ordered the Clerk of the District Court not to pay any money on deposit in the registry of the court to any creditor of the district as provided in the interlocutory decree herein, and requiring the clerk to make the payment provided in the interlocutory decree to said J. R. Mason in accordance with the terms and provisions of said decree, or in the alternative remanding this cause to the District Court with instructions to consider and pass upon this motion.

This motion is based upon the annexed affidavit and the transcript of record herein. The annexed affidavit is referred to as setting forth the matters pertinent to this motion and the motion is made upon the ground that the rules of civil procedure for District Courts do not provide the relief or remedy obtained by the appellant in this cause, and upon the further ground that whether the order appealed from be affirmed or reversed, the decision of this court on the appeal will not and cannot reach the question or determine the question as to whether the said J. R. Mason is entitled to payment under the plan of composition by virtue and reason of the deposit of his

bonds made on July 3, 1942, with the registry of the lower court, but can only determine the question whether or not the lower court rightfully entered its order suspending the provisions of the final decree, and the determination of the appeal therefor will leave undecided all questions relating to the deposit of the securities by said J. R. Mason before the expiration of the 12 months period.

Dated, December 10, 1942.

Paul A. McCarthy,
W. Coburn Cook,
Attorneys for Appellee.

[Title of Court and Cause.]

NOTICE OF MOTION.

To Anderson-Cottonwood Irrigation District and to
L. C. Smith and A. L. Cowell, Esquires, Its Attorneys:

You and each of you will please take notice that on Monday, the 21st day of December, 1942, at the hour of 10 o'clock a. m. of said day, at the court room of this court in the Post Office Building, San Francisco, California, appellee will make the foregoing motion.

Dated, December 10, 1942.

Paul A. McCarthy,
W. Coburn Cook,
Attorneys for Appellee.

[Title of Court and Cause.]

AFFIDAVIT OF J. R. MASON.

State of California,
City and County of San Francisco.—ss.

J. R. Mason, being duly sworn, says:

That he is appellee in the above entitled cause; that this is a municipal bankruptcy proceeding in which the District Court approved the plan of composition, which provided for certain payments to be made to the creditors of the district who were bondholders. (R. 2.)

That subsequently, on July 9, 1941, the District Court entered a final decree (R. 3, 10); that said final decree provided for the deposit of \$24,799.14 with the registry of the court as disbursing agent to be distributed by the registrar for the purpose of taking up and retiring and refinancing in accordance with the plan of composition the remaining outstanding old obligations, and that such old obligations might be presented to the registrar for that purpose within the period of twelve months from the date thereof and provided further "that all such outstanding old obligations of the petitioning district which are not so presented to the registrar within twelve (12) months from the date hereof shall thereafter be forever barred from participating in the plan of composition or in the funds held in the registry of this court;" (R. 7, 8.)

That affiant appealed from the final decree on August 7, 1941 (R. 14) and this Circuit Court of Appeals on March 21, 1942, affirmed the final decree.

That thereafter affiant obtained an order from this court suspending the running of the time for presentation of affiant's bonds to the registrar (R. 16) and in proper and due time filed a petition for writ of certiorari in the United States Supreme Court. That the Supreme Court denied a writ of certiorari on June 1st, 1942 (R. 17) and the mandate of this court was issued June 6, 1942. (R. 17.)

That thereafter and within the time allowed by law, affiant filed a petition for rehearing of said petition for a writ of certiorari in the United States Supreme Court, and this petition was subsequently on October 12, 1942, denied.

In the meantime, on June 29, 1942, affiant on motion obtained an order from the District Court suspending the running of the time for deposit of affiant's bonds until October 31, 1942. (R. 22.)

That the appellant in the above entitled cause took an appeal from the said order and such appeal is now pending.

That after filing notice of appeal the said appellant made an ex-parte application to the District Court for an order directing stay of proceedings pending the appeal (R. 31) and the court pursuant thereto granted an order for supersedeas bond (R. 33), which amongst other things provided that upon the giving of a bond in the amount of \$17,300.00 "the Clerk of this Court be, and hereby is instructed not to pay any money on deposit in the registry of this Court to any creditor of said district as provided in said interlocutory decree." (R. 34.)

That affiant is the owner and holder and at all times herein has been such undisputed owner and holder of original bonds of said appellant in the amount of \$41,000, with appurtenant interest coupons, and that prior to the expiration of the said 12 months period provided for the deposit of bonds in said final decree, which 12 months period expired on or about July 9, 1942, said affiant did on July 3, 1942, deposit all of said bonds with the registry of said court as provided in said final decree (R. 41), and received a receipt by the hand of the clerk of said court acknowledging receipt thereof. (R. 44.)

J. R. Mason.

Subscribed and sworn to before me this 10th day of November, 1942.

(Seal)

Violet Neurenberg,
Notary Public in and for the City and
County of San Francisco, State of
California.

My commission expires December 31, 1942.

[Title of Court and Cause.]

POINTS AND AUTHORITIES ON MOTION.

STATEMENT.

This is a municipal bankruptcy proceeding in which the District Court approved the plan of composition which provided for certain payments to be made to the creditors who were bondholders. (R. 2.) J. R. Mason is appellee and one of the bondholders.

On July 9, 1941 the District Court entered a final decree. (R. 3, 10.) The final decree provided for the deposit of money with the registry of the court as disbursing agent to be distributed by the registrar to the creditors. This final decree had a provision that "all such outstanding old obligations * * * which are not so presented to the registrar within twelve (12) months from the date hereof shall thereafter be forever barred from participating in the plan or in the funds held in the registry of this Court;" (R. 7, 8.)

J. R. Mason appealed from the final decree and this court on March 21, affirmed the final decree.

Thereafter J. R. Mason obtained an order from this court suspending the running of the time for presentation of his bonds, pending application for a writ of certiorari in the United States Supreme Court. (R. 16.) The Supreme Court denied the petition on June 1st, 1942 (R. 17) and the mandate of this court was issued June 6, 1942. (R. 17.)

Within proper time J. R. Mason filed a petition for rehearing of his petition for writ of certiorari. This petition was filed in Washington after adjournment of the Supreme Court so that it was not passed upon until October 12, 1942, when it was denied.

Be it noted that 12 months from the signing of the final decree expired on or about July 7, 1942, so that J. R. Mason was naturally apprehensive that if he should fail in his petition for rehearing in the Supreme Court it might be construed that his time limit for depositing his bonds would have already expired, so on June 29, 1942, prior to the expiration of the

12 months, he obtained an order from the District Court suspending the running of the time for deposit of his bonds until October 31st, 1942. (R. 22.)

In the meantime, however, being apprehensive lest this procedure would fail, he took an alternative procedure under Rule 8 of Rules of Civil Procedure for District Courts and actually filed his bonds with the registrar of the court with a declaration which was in the alternative but which deposit he contends fully complied with the provisions of the final decree. (R. 41, 44.) This deposit was made with the clerk on July 3, 1942, and appellee contends that he is entitled to be paid because he had actually complied with the order of the court and deposited prior to July 7, 1942.

The Anderson-Cottonwood Irrigation District appealed from the order of the District Court suspending the running of the 12 months period. The notice of appeal was filed July 27, 1942, long after Mason deposited his bonds.

The District Court on application granted an order for supersedeas bond on September 21, 1942, in which order it was provided "that until said appeal is finally determined or dismissed, the clerk of this court be and hereby is instructed not to pay any money on deposit in the registry of this court to any creditor of said district as provided in said interlocutory decree."

ARGUMENT.

It is contended by movant, first, that the appeal in this case will not determine the question whether Mason deposited prior to the expiration of the 12

months period and is entitled on that account to disbursement of the funds as a creditor, regardless of the order of the District Court suspending the 12 months period, and secondly, that the supersedeas order exceeds the authority of the District Court and should be modified to permit Mason to collect his money upon the deposit made theretofore and prior to the expiration of the original 12 months period.

The test of this motion may be summarized as follows: Suppose the order from which the appeal was taken had not been made at all, would the clerk properly pay Mason the funds deposited?

ALTERNATIVE RELIEF.

Rule 8 (a) and (e) (2) of Federal Rules of Civil Procedure provides for alternative and mutually exclusive remedies. In other words, alternative and exclusive remedies are recognized by this rule. Collier on Bankruptcy, 14th Ed., 1941, Vol. 3, page 156, suggests:

“In order to prevent the proof of claim being treated as a final election of remedy, and also to provide against possible objections to a subsequent withdrawal of the proven claim, the latter should reserve the rights to the security and include a specific statement that the claim is filed only as an alternative to the primarily asserted security.”

And cites Moore Federal Practice, Vol. 1, pages 556 to 558. Moore points out that rule 54 (c) makes it clear that the demand for judgment is no part of the claimant's cause of action.

Moore declares that Rule 8 (a) (3) applies to all pleadings in which a claim for affirmative relief is set forth.

There seems no reason why it should not apply to Mr. Mason's claim and deposit with the clerk which was in the alternative and filed before the expiration of the time limit. That seems to be exactly the procedure which was recommended by Mr. Collier in his work on bankruptcy.

A number of cases are collected together in Mr. Collier's work at page 156 which we will not cite at this time, except to refer to the case of *Thomas v. Taggart*, 209 U. S. 385, 28 S. Ct. 519, in which the Supreme Court declares:

"We are of the opinion that in view of the reservation just made, there was nothing in Hall's conduct amounting to an election to pursue his claim as a creditor in bankruptcy which now prevent his recovery of the certificates of stock in question."

In other words, alternative remedies are permitted in bankruptcy, and the nature of the case cited and the breadth of the rule indicates that it should be applied to the instant case.

At page 336, in the same volume, Collier further states:

"As already discussed, the advisable procedure for the claimant is to file within the statutory period a proof of claim in which he points out that reclamation proceedings are pending, and that the proof of claim is merely designed to

preserve the rights that the claimant may have *in the event of his defeat in the reclamation proceeding.*"

Stay of proceedings has no retrospective operation. The supersedeas order was retrospective.

The stay is not retroactive and does not invalidate prior proceedings. Moore (1938), Vol. 3, page 3300, where under note 7 numerous authorities are cited.

Rule 62 (d) of Rules of Civil Procedure for District Courts only provides that the appellant, when an appeal is taken, may obtain a stay.

It is contended that the stay applies only to enforcement of the judgment itself.

The effect of a stay "is limited to enforcement of the judgment itself." 2 Cal. Jur. 473. Hence the action desired by appellee not proceeding from the order or judgment at all, cannot be stayed. The only stay proper was one which would apply to bonds deposited after the stay was obtained, or in any event after July 7, 1942 when the original 12 months period would have expired.

We do not here argue the merits of the case, which argument will attempt to show that the 12 months period could not take effect until the mandate came down and that Mason would have had 12 months from the filing of the mandate to deposit his bonds. But we do not here argue that point, relying upon the proposition that the stay contemplated by Rule 62 (d) could not affect the proceedings or action already taken and the effect thereof, namely payment to Mason.

At 2 Cal. Jur. 469 it is declared that a stay of proceedings pending an appeal has no retrospective operation and does not undo or render nugatory or unlawful any action that has already been had before the supersedeas became effective, citing *Jacobs v. Superior Court*, 133 Cal. 364, 65 Pac. 826.

It is not correct to say that a judgment is stayed—but only proceedings upon the judgment. (*Idem* page 470.) That, however, is not precisely the point, the precise point being that Mason did deposit before the expiration of the 12 months period, which he had a right to do even if the District Court had not made the order from which the appeal was taken.

The supersedeas order in effect goes further than reversing the order from which the appeal was taken because it declares that even if Mason deposited the bonds within the original 12 months period he still could not collect.

At 4 C. J. S., page 1151, it is declared that the general rule is that the stay extends only to the prevention of any process, act or proceeding in connection with the enforcement of the order appealed from.

It is respectfully contended that the motion should be granted.

Dated, Turlock, California,
December 10, 1942.

Paul A. McCarthy,
W. Coburn Cook,
Attorneys for Appellee.

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No. 10,271

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

ANDERSON-COTTONWOOD IRRIGATION DISTRICT, vs. J. R. MASON,	<i>Appellant,</i> <i>Appellee.</i>
--	---

APPELLANT'S REPLY BRIEF.

L. C. SMITH,
Masonic Building, Redding, California,
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Belding Building, Stockton, California,
Attorneys for Appellant.

FILED

JAN 15 1943

PAUL P. O'BRIEN,
CLERK

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No. 10,271

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ANDERSON-COTTONWOOD IRRIGATION

DISTRICT,

vs.

J. R. MASON,

Appellant,

Appellee.

APPELLANT'S REPLY BRIEF.

Appellant acknowledges receipt on the 5th day of January, 1943, of copies of the brief of Appellee in the above-entitled case.

The brief does not challenge any of the authorities which we cited in support of the points made in our opening brief, except to say that the case of *In re Woods*, 143 U. S. 202, 12 S. Ct. 417, cited by us does not seem to be in point. As it was cited only by way of illustration, this comment is not important. Although Appellee virtually concedes the soundness of the points made in our brief, he cleverly seeks to avoid their effect by making five points designed to nullify it. In this reply we will review these five points.

I. JUDGE WELSH HAD NO AUTHORITY TO MAKE
HIS ORDER OF JULY 1ST.

The first point made by Appellee is that there is no merit in the appeal because Judge Welsh properly granted the order extending time. This is really the main point in the appeal. In our opening brief we showed that under Section 350 of Title 28 U. S. C. the District Court had authority to stay the execution and enforcement of the Final Decree for a reasonable time to enable Mr. Mason "to apply for and to obtain" a writ of certiorari from the Supreme Court, and the cases cited by us in our opening brief clearly held that the District Court had no power to change any of the terms of that Decree.

On pages 2 and 3 of Appellee's brief there is a quotation from Judge Welsh's order to the effect that "the creditors are hereby granted an extension of time to October 31, 1942 within which to deposit their bonds with the Clerk of this Court, instead of July 7, 1942, as provided in the Final Decree". This provision of Judge Welsh's order was quoted in our opening brief to show that the order was not a stay of the execution and enforcement of the Decree but an actual change in its terms. This is the real gist of our appeal, which attacks the order because it did not purport to stay the execution and enforcement of the Final Decree but was an actual change in the substance of the document itself.

Appellee seizes upon the provision in Section 330 of Title 28 U. S. C. to the effect that the Judge of the District Court may make the stay conditional upon

giving a bond to answer for all damages and costs which the other party may sustain by reason of the stay, as a complete answer to our argument that the stay may be granted only for the purpose of enabling a party "to apply for and obtain" a writ of certiorari. He argues that the provision in Section 350 contemplates that a stay may be obtained for the benefit of a person who applies for but *fails* to obtain a writ of certiorari.

There are, of course, situations in which a stay pending an application for a writ of certiorari would cause serious damage to the other party if the writ is not obtained and the law properly makes provision for a bond in such a case. As a matter of fact, Judge Welsh's order was conditioned upon giving a bond in the amount of \$500.00 to cover any damages which the District might sustain by reason of the delay in the enforcement of the decree.

As we showed in our opening brief, the provision of the Final Decree to which a stay was particularly applicable was the provision that the Clerk of the Court should notify R. F. C. that money was available in the registry of the Court for the purchase of refunding bonds of the Irrigation District (R. 8). This provision and the time limit could have been stayed by a proper order of the District Court, but, as we showed in our opening brief, the District Court had no power whatever to modify the terms of the Final Decree which the Circuit Court of Appeals had affirmed, by making a new time limit. The decision of the Circuit Court of Appeals was a final and conclu-

sive determination that the time limit in the Final Decree was proper, and no subsequent action of the District Court or any other Court except the Supreme Court of the United States could change it. The District Court had authority to stay the enforcement of the time limit pending the application for a writ of certiorari, but when the application for the writ was denied and the petition for a rehearing in the Supreme Court was denied, there was no reason for any further stay of proceedings and the decree again became in full force and effect. If the writ of certiorari had been granted and the decree had been modified, then Mr. Mason would have been entitled to all the benefits of the modified decree, but as his application for a writ of certiorari was twice rejected by the Supreme Court he has no basis whatever for his contention that after his petition for certiorari had been conclusively rejected he can now come in and present his bonds for payment.

II. QUESTION IS NOT MOOT BECAUSE OF JUDGE HEALY'S ORDER.

The second point made is that the question presented is moot because of the order of Judge Healy extending the time for the deposit of bonds.

This point is made apologetically and is refuted by the terms of the order itself. The order is set forth in full on page 16 of the record and provides that the running of the time within which Appellant may present his bonds and coupons to the registrar for

payment "is suspended until and for a period of 60 days after the United States Supreme Court 'shall have passed upon' applicant's petition for writ of certiorari, or if such writ be granted, until a period of 60 days after the Final Decree shall have become final". The United States Supreme Court denied the writ of certiorari on the first day of June, 1942 (R. 17). This certainly was the time when the Supreme Court "passed upon" applicant's petition for certiorari, and this is virtually conceded by counsel for Mr. Mason on page 9 of their brief. Therefore, passing the question as to the authority of a single Judge of the Circuit Court of Appeals to extend the time for the deposit of bonds without an action by the Court staying its mandate confirming the Final Decree, there is obviously no merit in the second point of Appellee herein.

III. MR. MASON'S DEPOSIT OF HIS BONDS WAS INEFFECTIVE.

The third point of Appellee is that the appeal presents a moot question because Mr. Mason had deposited his bonds within the time prescribed, and the motion of Appellee to modify the supersedeas order and to require the clerk of the Court below to pay Mr. Mason for his bonds should be granted.

It is true that on July 3, 1942, Mr. Mason addressed a letter to the clerk of the District Court and accompanied that letter with the bonds in question here and certain appurtenant coupons and on the same date

received from the clerk of the Court a receipt for the bonds and the coupons. It was expressly provided in this letter as follows:

“No transfer of the title to any bonds or coupons handed you herewith is effected or consented to by this deposit, and I decline to take the money payable by you under the said Final Decree at this time, and protest the said Final Decree in so far as the same is not final but possibly none the less operative, and if as a result of the Petition for a Rehearing the said Final Decree should be reversed, I intend to, and will claim each and every right that I am entitled to under and by virtue of my ownership or possession of the above listed bonds and coupons, and you shall return to me or my order these securities, on demand.”

This was obviously not a deposit in compliance with the Final Decree, which contained the following provision (R. 7 and 8):

“(b) That the sum of Twenty-four Thousand Seven Hundred Ninety-Nine and Fourteen/100 Dollars (\$24,799.14), paid in to the registry of this Court by the Disbursing Agent, be disbursed by the Registrar for the purpose of taking up and retiring and refinancing, in accordance with the plan of composition approved in this cause, such remaining outstanding old obligations of the petitioning district as are affected by the plan of composition, and which may be presented to the Registrar for that purpose within the period of twelve (12) months from the date hereof; that all such obligations so presented and paid for, be forthwith cancelled and returned to the petition-

ing district by the Registrar; that all such outstanding old obligations of the petitioning district which are not so presented to the Registrar within twelve (12) months from the date hereof shall thereafter be forever barred from participating in the plan of composition or in the funds held in the registry of this Court."

The third point also includes an argument in favor of the granting of the Motion of Appellee, printed as an appendix of his brief, to modify the supersedeas order and to require the Clerk to pay Mr. Mason for his bonds.

It is argued that certain cases on alternative relief justify such an order. We confess inability to see where these cases are in point and will therefore defer consideration of them and of this part of the argument until the case is called for oral argument, remarking only that we see no merit in the motion.

IV. APPEAL SHOULD NOT BE DISMISSED.

The fourth point is that the appeal was not properly taken and should be dismissed.

The burden of this argument is that Section 24 of the Bankruptcy Act as revised in 1938 was not intended to permit an appeal from an order of the type here involved because that order is discretionary, and unless an abuse of discretion is shown an appeal will not lie.

In our opening brief we showed that the order of Judge Welsh was beyond his jurisdiction; that the

judgment of the Circuit Court of Appeals affirming the Final Decree was a conclusive determination that the terms of the Final Decree were binding upon Mr. Mason and that no Court had a right to change, in any particular, the terms of that decree except the Supreme Court of the United States. Accordingly the authorities cited in the discussion of the fourth point of the Appellee are not in point because there is no question of the abuse of discretion, but it is a question of the jurisdiction of the District Court to make an order of the kind which was made on July 1, 1942.

**V. SECTION 83e OF CHAPTER IX OF THE BANKRUPTCY
ACT IS NOT APPLICABLE.**

The fifth point is that the appeal and the proceeding in the Supreme Court for Writ of Certiorari extend the 12 months limit. This is based on the provision of Section 403(e) of Title 11 U. S. C. (Section 83e of Chapter IX of the Bankruptcy Act), that when an appeal is taken from the *Interlocutory* Decree, if the Decree prescribes a time within which any action is to be taken, the running of such time is suspended during an appeal until final determination thereof. It is conceded that there is no such provision affecting a final decree but it is argued that the same principle should apply. There is no merit in this point. If Congress wanted to make such a provision applicable to Final Decrees, it should have done so. We have shown in our opening brief that Mr. Mason had ample opportunity to present the question of the

propriety of the time limit to the Circuit Court of Appeals and did not do so in a proper manner and the Circuit Court of Appeals expressly refused to consider the point when it was made at the oral argument and confirmed the Decree with the 12 months time limit. Mr. Mason deliberately refused to deposit his bonds within the time limit prescribed by this Court. His determination so to proceed was doubtless made in the faith that his petition for rehearing of his application for a writ of certiorari would be favorably considered by the Supreme Court. It was not so considered, and he must now take the consequences of his misguided faith.

Dated, Stockton, California,
January 15, 1943.

Respectfully submitted,

L. C. SMITH,

A. L. COWELL,

Attorneys for Appellant.

11

United States
Circuit Court of Appeals
For the Ninth Circuit.

EUGENE J. WESTPHALEN, CHARLES ZAN-
ELLA and AETNA CASUALTY AND
SURETY COMPANY, a corporation,
Appellants,
vs.

BANKERS INDEMNITY COMPANY,
a corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

FILED

DEC 17 1942

PAUL P. O'BRIEN,
CLERK

No. 10286

United States
Circuit Court of Appeals
For the Ninth Circuit.

EUGENE J. WESTPHALEN, CHARLES ZAN-
ELLA and AETNA CASUALTY AND
SURETY COMPANY, a corporation,
Appellants,
vs.

BANKERS INDEMNITY COMPANY,
a corporation,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

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In the District Court of the United States In and
For the Northern District of California,
Southern Division

No. 21865S

BANKERS INDEMNITY INSURANCE COM-
PANY, a Corporation,

Plaintiff,

vs.

EUGENE J. WESTPHALEN, CHARLES ZA-
NELLA, FRED E. TUNZI, JULIUS PETER-
SEN, DENMAN R. CURRY and AETNA
CASUALTY AND SURETY COMPANY, a
Corporation,

Defendants.

COMPLAINT AND PETITION FOR DECLARATORY JUDGMENT

Plaintiff, Bankers Indemnity Insurance Com-
pany, a Corporation, brings this suit under and
pursuant to the Federal Declaratory Judgment Act
(Judicial Code, Section 274 d, 28 U. S. C. A., Sec-
tion 400) and alleges:

I.

That plaintiff, Bankers Indemnity Insurance
Company, is now and was at all times herein men-
tioned a corporation organized and existing under
and by virtue of the laws of the State of New
Jersey, duly authorized and licensed to do busi-

ness in the State of California, and having its principal place of business within the State of California in the City and County of San Francisco.

[1*]

II.

That defendant Eugene J. Westphalen and defendant Charles Zanella are citizens of the State of California and reside at Willits, Mendocino County, California; that defendant Fred E. Tunzi is a citizen of the State of California and resides at or near Petaluma, Sonoma County, California; that defendant Julius Petersen is a citizen of the State of California and resides at or near Novato, Marin County, California; that defendant Denman R. Curry is a citizen of the State of California and resides at or near Napa, Napa County, California; that defendant Aetna Casualty and Surety Company is a corporation organized and existing under the laws of the State of Connecticut.

III.

That the amount in controversy, exclusive of interest and costs, exceeds the sum of three thousand dollars (\$3000.00).

IV.

That this suit is brought under and pursuant to the Federal Declaratory Judgment Act (Judicial Code, Section 274d, 28 U. S. C. A., Section 400).

*Page numbering appearing at foot of page of original certified Transcript of Record.

V.

That on or about the 11th day of July, 1940, plaintiff issued a policy of automobile liability insurance numbered CB34576 to defendant Fred E. Tunzi; that the policy period was from July 1, 1940, to July 1, 1941, and said policy has been in effect from July 1, 1940, to the date of this complaint; that in said policy plaintiff agreed with defendant Fred E. Tunzi to pay on behalf of said Fred E. Tunzi, subject to the limits of liability, exclusions, conditions and other terms of said policy, all sums, not exceeding \$10,000.00 for each person and not exceeding \$20,000.00 for each accident, which defendant Fred E. Tunzi should become obliged to pay by reason of the liability imposed upon him by law for damages, including damages for care and [2] loss of service, because of bodily injury, and not exceeding \$5000.00 because of property damage, sustained by any person or persons caused by accident and arising out of the ownership, maintenance and use of two certain automobiles and two certain trailers described in said policy as (1) 1938 Fageol 6, Serial No. E729, Motor No. 401943; (2) 1937 Reliance Trailer (20 foot) Serial No. 37318; (3) 1928 Fageol Diesel, Serial No. 9143, Motor No. 471,215; (4) 1929 Reliance Trailer (20 foot) Serial No. 2631; that said policy further provides that the purposes for which said two automobiles and said two trailers are to be used are "Commercial purposes"; that said policy expressly provides that said automobiles "will be

principally garaged and used” in the town of Novato, California; and further provides that the insurer, plaintiff herein, should not be liable for loss or damage caused while any automobile involved therein was rented under contract or leased; that by an endorsement appended to said policy and bearing even date therewith, it was specifically provided that in consideration of the premium at which the said policy was issued it was warranted by the insured that, subject to the territorial limitations of such policy, the regular and frequent use of the commercial type vehicles described in such policy “is and will be confined to the territory within 100 miles of Novato”; that the originals of said policy and said endorsements are on file with the Railroad Commission of the State of California; that a true copy of said policy and endorsements is attached hereto, marked “Exhibit A,” and the same is made a part hereof.

VI.

That on July 1, 1940, when the aforesaid commercial truck and trailer policy No. CB34576 became effective, the trucks and trailers covered thereby were owned by the insured Fred E. Tunzi of Petaluma, Sonoma County, California, who was the legal and registered owner thereof, but said trucks and trailers were in [3] fact being operated by one Julius Petersen in and around the town of Novato, Marin County, California, and their regular and frequent use was within 100 miles thereof;

that on or about the 8th day of December, 1940, the truck designated in the aforesaid policy CB34576 as 1938 Fageol 6, Serial No. E729, Motor No. 401943, and bearing California license 1940 No. BE 14682, and 1929 Reliance Trailer, Serial
PT

No. 2631 were returned to their owner, defendant Fred E. Tunzi, at Petaluma, Sonoma County, California, and by him rented under contract or leased to defendant Denman R. Curry of Napa, Napa County, California.

VII.

That following the renting under contract or leasing of the said 1938 Fageol 6 truck and 1929 Reliance trailer, Serial No. 2631 to defendant Denman R. Curry as aforesaid, no alteration or modification was made or requested by the insured in the terms or conditions of said policy No. CB34576, except that on the 2d day of January, 1941, by a special endorsement made at the request of said defendant Fred E. Tunzi, the name of the insured therein was corrected by plaintiff to read: "Fred E. Tunzi and Julius Petersen"; that said endorsement, dated January 2, 1941, was filed with the Railroad Commission of the State of California on the 3d day of January, 1941; that a true copy of said endorsement is attached to the said policy, "Exhibit A" hereto and the same is made a part hereof.

VIII.

That after the said 1938 Fageol 6 truck, Serial No.

E729, and 1929 Reliance Trailer, Serial No. 2631, were, by their owner, defendant Fred E. Tunzi, rented under contract or leased to defendant Denman R. Curry, as aforesaid, said truck and trailer, or either of them, were not garaged at or near Novato, California, but from on or about the 8th day of December, 1940, to the 14th day of January, 1941, the day of the hereinafter mentioned [4] accident, said truck and trailer were garaged at or near Napa, California; that during said period from December 8, 1940, to January 14, 1941, said 1938 Fageol 6 truck and 1929 Reliance trailer, Serial No. 2631, were not regularly and frequently used or used at all in making trips of within 100 miles of Novato, California, but were used during December, 1940, in making at least two round trips between Napa, California, and San Diego, California a distance in an airline of more than 450 miles each way, for the purpose of hauling basalt bricks or other basalt products on the southward journey; that during the period from January 1, 1941, to January 14, 1941, said truck and trailer were used in making at least three round trips, exclusive of the one on which the hereinafter mentioned accident happened, between Napa, California, and Piercy, California, a distance in an air line of approximately 140 miles each way, for the purpose of hauling grape sticks on the southward journey.

IX.

That while returning southward toward Napa on

a fourth trip on or about the 14th day of January, 1941, at about the hour of 12:30 A.M., while traversing Highway 101, commonly known as the Redwood Highway, at a point about $4\frac{1}{2}$ miles north of the town of Willits, Mendocino County, California, said 1938 Fageol 6 truck and said 1929 Reliance trailer, Serial No. 2631, stalled and stopped; that before they were again started a 1937 Pontiac coupe, California 1940 License No. 45A591, owned and driven by defendant Eugene J. Westphalen and carrying defendant Charles Zanella as a passenger, collided with the rear of said 1929 Reliance trailer, injuring both Eugene J. Westphalen and Charles Zanella and damaging both of the aforesaid 1937 Pontiac Coupe and the said 1929 Reliance trailer driven by defendant Denman R. Curry.

X.

That an actual controversy exists between plaintiff and [5] each and every defendant herein as follows: Defendants Fred E. Tunzi, Julius Petersen, and Denman R. Curry contend that since the 1938 Fageol 6 truck and 1929 Reliance trailer, Serial No. 2631, involved in the aforesaid accident are named and described in the said policy, No. CB34576, plaintiff herein has the obligation under said policy to defend said Fred E. Tunzi, Julius Petersen and Denman R. Curry, or any of them, in any action which may be brought against them, or any of them, because of personal injuries or

property damage suffered by said Eugene J. Westphalen and/or Charles Zanella in said accident; further, defendants Fred E. Tunzi, Julius Petersen and Denman R. Curry, Eugene J. Westphalen and Charles Zanella contend that should it be adjudged in said action or actions that said Fred E. Tunzi, Julius Petersen and Denman R. Curry, or any of them, have any liability to pay any sums to said Eugene J. Westphalen and/or Charles Zanella by reason of the injuries and/or damages incurred in said accident, then plaintiff herein has the obligation, within the limits of said policy No. CB34576, to pay said sums to Eugene J. Westphalen and/or Charles Zanella in satisfaction of such judgments; defendants Eugene J. Westphalen and Charles Zanella further claim that, under the terms of said policy No. CB34576 and the provisions of Section 11580 of the Insurance Code of the State of California, if they, or either of them, secure a judgment or judgments against the said Fred E. Tunzi, Julius Petersen and/or Denman R. Curry, as aforesaid, then the said Eugene J. Westphalen and Charles Zanella, or the one of them securing such judgment, will have a right of action against plaintiff herein on said policy, subject to its terms and limitations; Aetna Casualty and Surety Company, a corporation, claims that defendant Eugene J. Westphalen at the time of said accident was an employee of Davis, Skaggs & Co. of Willits, California; that said Davis, Skaggs & Co. were at said time and are now the insured of said Aetna

Casualty and Surety [6] Company under a policy of workmen's compensation insurance, pursuant to the terms of which said Aetna Casualty and Surety Company has become financially responsible for the care of defendant Eugene J. Westphalen as to workmen's compensation and medical expenses and is subrogated to the rights of its insured under the terms of the Labor Code of the State of California of which alleged subrogation they have duly notified plaintiff herein.

XI.

Plaintiff herein denies and controverts the contentions, and each of them, of the defendants as set forth in the foregoing paragraph of this complaint, and on its part contends that, although the 1938 Fageol 6 truck and 1929 Reliance trailer involved in the aforesaid accident are named and described in said policy of insurance No. CB34576, plaintiff herein has no obligation or liability under said policy, so far as said accident or the injury or damages arising therefrom are concerned, (1) because at the time of said accident and for several weeks previously thereto the garaging of said 1938 Fageol 6 truck and 1929 Reliance trailer, Serial No. 2631 was not at or near Novato, Marin County, California, and for a like period the regular and frequent use of said 1938 Fageol 6 truck and 1929 Reliance trailer, Serial No. 2631, was not confined to the territory within 100 miles of Novato, Marin County, California, as provided by the endorsement

to that effect made a part of and issued concurrently with said policy No. CB34576, but on the contrary said truck and trailer were regularly garaged in Napa County, California, and were being regularly used in Napa, Sonoma and Medocino Counties and in making trips more than 100 miles from Novato and in territory where the premium for like liability insurance was much greater than in territory within 100 miles of Novato; (2) for the further reason that at the time of said accident said 1938 Fageol 6 truck and 1929 Reliance trailer, Serial No. 2631, were by their owner, [7] Fred E. Tunzi, rented under contract or leased to defendant Denman R. Curry, under which circumstances plaintiff by the express terms of said policy is not liable for loss or damage (see Policy, General Conditions, Paragraph N, subdivision 3); (3) as to defendant Denman R. Curry for the further reason that he is not a named insured or any insured or entitled to coverage under any of the terms of said Policy No. CB34576.

Wherefore, plaintiff prays:

(a) That defendants and each of them be required to answer this bill of complaint in the nature of a petition for a declaratory judgment;

(b) That this Court adjudge, decree and declare the rights and legal relations of the parties under and by reason of that certain policy of automobile liability insurance hereinabove referred to in order that such declaration have the force and effect of a final judgment and decree;

(c) That this Court adjudge and decree that

plaintiff herein has no obligation under said policy of automobile insurance to defend defendants Fred E. Tunzi, Julius Petersen or Denman R. Curry or any of them, in any actions at law which may be brought against them by defendants Eugene J. Westphalen and Charles Zanella, or either of them, or by any other person, because of bodily injuries or property damage suffered by said Eugene J. Westphalen and Charles Zanella because of the accident aforesaid.

(d) That this Court adjudge and decree that plaintiff herein has no liability to any person under said policy of automobile liability insurance by reason of the said accident or the results thereof, (1) because said accident did not happen when the regular and frequent use of the aforesaid 1938 Fageol 6 truck and 1929 Reliance trailer, Serial No. 2631, was confined to the territory within 100 miles of Novato, California; (2) because [8] said accident did happen when said 1938 Fageol 6 truck and 1929 Reliance trailer, Serial No. 2631, were rented under contract or leased, and (3) because defendant Denman R. Curry is not a named insured or any insured in said policy of automobile liability insurance or entitled to coverage under any provision of said policy.

(e) That this Court grant a preliminary injunction restraining the defendants herein, and each of them, their attorneys, employees, heirs, assigns, representatives, and all other persons concerned or interested therein from taking any proceedings for the purpose of imposing any liability

upon plaintiff herein, whether based upon any bodily injuries or property damages or otherwise, due to or arising from that certain accident aforesaid.

(f) For such other and further relief as may to the Court seem meet and proper in the premises.

CHARLES B. MORRIS
CARROLL B. CRAWFORD
Attorneys for Plaintiff.

State of California,
City and County of San Francisco—ss.

Charles B. Morris, being first duly sworn, deposes and says: That he is one of the attorneys for the plaintiff and petitioner herein and makes this verification on its behalf for the reason that he is more fully in possession of all the facts and circumstances relating to the matters therein alleged than the said plaintiff and petitioner; that he has read the foregoing Complaint and Petition for Declaratory Judgment and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on information and belief [9] and as to those matters he believes it to be true.

CHARLES B. MORRIS.

Subscribed and sworn to before me this 2nd day of May, 1941.

[Seal]

RAE G. BEHRENS

Notary Public in and for the City and County of
San Francisco, State of California. [10]

EXHIBIT A

49-437

Fred E. Tunzi

January 2, 1941

Name of assured is hereby corrected to read:

Fred E. Tunzi and Julius Petersen

Nothing herein contained shall be held to alter, vary or waive any of the agreements, conditions or declarations of either policy, except as herein stated, nor shall this endorsement bind either Company until countersigned by a duly authorized representative of each Company.

This endorsement, when countersigned and attached to Policy, becomes effective on the Second day of January 1941, noon, standard time.

Attached to and forming part of Policy or Policies herein designated, that is to say,

*Policy No. CB 34576 of The Columbia Fire Insurance Company of Dayton, Ohio, (i.e. Part One of the Combination Policy) and

*Policy No. CB 34576 of the Bankers Indemnity Insurance Company of Newark, N. J., (i.e. Part Two of the Combination Policy).

*Agents will enter Policy Number in blank space applying to the Company whose policy is affected and rule out the reference to the Company whose policy is Not affected by this endorsement. If Both are affected, repeat the Policy Number in both blank spaces.

Exhibit A (Continued)

Countersigned

L. R. TOBIN,

Authorized Agent.

JOHN T. BEALES,

General Agent.

H. P. JACKSON,

President,

BANKERS INDEMNITY

INSURANCE COMPANY.

PAUL B. SOMMERS,

President,

THE COLUMBIA FIRE

INSURANCE COMPANY.

[Endorsed]: Filed Railroad Commission, Jan.
3, 1941. [11]

(February 1940)

Description of Use Endorsement—

Commercial Automobiles

(Pacific Coast Territory Only)

For attachment to and forming part of Policy
No. CB 34576 of the Columbia Fire Ins. Co. &
Bankers Indemnity Insurance Company.

In consideration of the premium at which the
Policy designated above is issued, it is warranted
by the Insured that

Warranty No. 1

Subject to the territorial limitations of such
Policy, the regular and frequent use of the com-

Exhibit A (Continued)

mercial type vehicle(s) described in such Policy is and will be confined to the territory within 100 miles of Novato.

Warranty No. 2

The commercial type vehicle(s) described in such Policy is not and will not be used primarily for the transportation of inflammable liquids having hazard classification equal to or greater than gasoline.

The provisions of this endorsement apply only to commercial automobiles, truck type tractors and commercial trailers and semi-trailers of more than 11½ tons manufacturers' rated load capacity (for hyphenated load capacities the higher capacity will govern).

All other terms and conditions of such Policy remain unchanged.

Countersigned July 11, 1940, at San Francisco, California.

L. R. TOBIN,
Authorized Agent.
JOHN T. BEALES,
General Agent. [12]

Item	Year	Name	Serial No.	Motor No.	P.L.	P.D.
1	1938	Fageol 6	E-729	401943	88.55	40.70
2	1937	Reliance Trailer (20 foot)	37318		44.28	20.35
3	1928	Fageol Diesel	9143	471215	88.55	40.70
4	1929	Reliance Trailer (20 Foot)	2631		44.28	20.35

L. R. TOBIN. [13]

Exhibit A (Continued)

TERMINATION OF COVERAGE
ENDORSEMENT

It is agreed that such Public Liability (Bodily Injury Liability) and Property Damage Liability Insurance as is afforded by the policy of which this endorsement is a part shall not terminate or become void for any reason whatsoever, except by the annual expiration of said policy, any statement in the policy or in any endorsement issued in connection therewith to the contrary notwithstanding, until after ten-days' notice thereof in writing shall have been given by the insurer to the Railroad Commission of the State of California at its office in the State Building, San Francisco, California, said period of ten days to commence to run from the date said notice is actually received at said office of the Commission.

It is further agreed that if any policy of which this endorsement forms a part shall be cancelled or otherwise terminated and shall thereafter be reinstated at any time, notice in writing of such reinstatement shall be given by the insurer at the time of issuance thereof to said Railroad Commission at its said office.

It is further agreed by the insurer that the insured is engaged in the business of transporting property for compensation or hire over the public highways in the State of California.

It is further agreed that it is not the intention

Exhibit A (Continued)

of this endorsement to alter the exclusions of the policy of which it forms a part.

Effective at 12:00 O'clock A.M. of the 1st day of July 1940. Attached to and made a part of Policy No. CB 34576 of the Columbia Fire Insurance Company and Bankers Indemnity Insurance Company issued to Fred E. Tunzi. Countersigned at San Francisco, California. Date of Countersignature July 11, 1940. Countersigned by

L. R. TOBIN,

Authorized Representative.

JOHN T. BEALES,

General Agent.

[Endorsed]: Filed Railroad Commission, July 12, 1940. [14]

Combined Automobile Policies
including

National Standard Automobile Liability Policy
(Please Read Them Carefully)

Insured Fred E. Tunzi.

Premium \$387.76.

Expires July 1, 1941.

Car, commercial trucks.

No. C.B. 34576

Exhibit A (Continued)

The Columbia Fire Insurance Company
of Dayton, Ohio
and

Bankers Indemnity Insurance Company
of Newark, N. J.

John T. Beales
General Agent
220 Bush Street
San Francisco, California
Phone SUTter 7312

541 So. Spring St.,
Los Angeles, Calif.
Phone VAndike 3872

Report All Accidents (Claims) Promptly

No. C.B. 34576

Combined Automobile Policies including National
Standard Automobile Liability Policy

The Columbia Fire Insurance Company
A Stock Corporation of the City
of Dayton, Ohio, and

Bankers Indemnity Insurance Company
A Stock Corporation of the City
of Newark, New Jersey

(Each Company acting severally and solely in its
own behalf and not for the other) by the Policies
hereinafter contained, designated Part One and
Part Two respectively, whereof the following
Schedule is a part, do insure as follows:

Exhibit A (Continued)

Schedule of Declarations Respectively

Applying to Each Policy

Section 1. Name of Insured—Fred E. Tunzi.

Address of Insured—Box 89 Star Route, Petaluma, California.

Subject to all the provisions, exclusions, conditions and warranties contained in this policy, loss under The Columbia Fire Insurance Company policy, if any, payable, as interest may appear, to Insured and.....

Address

Section 2. Policy Period: From July 1, 1940 to July 1, 1941 12:01 A.M., standard time at the address of the named Insured as stated herein.

Section 3. This insurance is against only such and so many of the Coverages named in the Schedule below as are indicated by a specific premium in writing set opposite thereto. The limit of each Company's liability against each of such Coverages shall be as stated in each policy, subject to all of the terms of this policy having reference thereto.

Part 1—The following Coverages A, B, C, D, E, F, G, H, I, J, K, L, and M, apply to The Columbia Fire Insurance Company Policy.

Item	(For Home Office Use)	Amount of Insurance Rates	Net Premiums
A—Comprehensive (Excluding Collision or Upset) (Coverage A—page 2)		*Not Covered	
B—Fire (Coverage B—page 2)		*Not Covered	
C—Theft (Coverage C—page 2) “Broad Form”		*Not Covered	
D—Theft (Coverage D—page 2) “Deductible Form”		*Not Covered	
E—Tornado and Other Coverages (Coverage E—page 2)		*Not Covered	
F—Collision or Upset (Coverage F—page 2)		*Not Covered	
G—Convertible Collision or Upset (Coverage G—page 2)		*Not Covered	
Subject to the Convertible Additional Payment of \$.....			
H—Breakage of Glass (Coverage H—page 2)		*Not Covered	
I—Flood and Rising Water (Coverage I—page 2)		*Not Covered	
J—Towing and Road Service Expense (Coverage J—page 2)		*Not Covered	
K—Towing and Emergency Service Expense (Coverage K—page 2)		*Not Covered	
L—Special Combined Additional Coverage (Coverage L—page 2)		*Not Covered	
M—Loss of Use by Theft (Coverage M—page 2)		*Not Covered	

No other coverage granted under this Policy except as contained in endorsement or endorsements attached hereto for which the consideration is a premium of.....

Total Premium The Columbia Fire Ins. Co. (Gross) Nil

The Amount of Insurance, in no case exceeding the amount hereinabove stated, is further limited by Endorsement entitled.....if attached hereto, in which case premium credit is entered here.

*Insert a stated amount of Insurance or the words “Actual Cash Value,” or “Cash Value” Nil

Part 2—The following Coverages, A and B, apply to Bankers Indemnity Insurance Company Policy.

Total Premium Bankers Indemnity Insurance Co.	\$387.76
Total Premium Both Companies	\$

Item a. Insured's occupation or business is Truckman (If married woman, give husband's occupation or business)

c. The description of the automobile and the facts respecting its purchase are as follows:

Year	Trade Name (Give Truck Tonnage)	Type of Body	Serial Number	No. of Cyls. Model	Factory List Price	Actual Cost Including Equipment	Purchased by Insured Month Year	New or Used
			s	Cyls.				
			m	Mdl.				
	As per Slip Attached							

Exhibit A (Continued)

Item d. The purposes for which the automobile is to be used are Commercial purposes. (a) The term "pleasure and business" is defined as personal, pleasure, family and business use. (b) The term "commercial" is defined as the transportation or delivery of goods, merchandise or other materials, and uses incidental thereto, in direct connection with the named Insured's business occupation as expressed in Item a. (c) Use of the automobile for the purposes stated includes the loading and unloading thereof.

e. The automobile will be principally garaged and used in the above town, county and state, unless otherwise specified herein Novato, California.

f. The named Insured is the sole owner of the automobile, except as herein stated: No Exceptions.

g. No insurer has canceled any automobile insurance issued to the named Insured, nor declined to issue such insurance, during the past year, except as herein stated: No Exceptions.

h. The automobile described is fully paid for by the Insured, and is not mortgaged or otherwise encumbered, except as follows: No Exceptions; if purchased under conditional sales or lease agreement, state amount unpaid, \$. represented by notes of \$ each due monthly, the difference having been paid in cash. Any loss under The Columbia Fire Insurance Company policy issued hereunder that may be proved

Exhibit A (Continued)

due the Insured shall be payable, as interest may appear to the Insured and.....

Countersigned at San Francisco, California, this 11th day of July 1940.

F. S. TOLIN,

Authorized Agent.

JOHN T. BEALES,

General Agent. [15]

* * * * *

Part Two, being the Policy of the Bankers Indemnity Insurance Company of Newark, N. J. (Herein Called the Company).

Does Hereby Agree with the Insured, named in the Declarations made a part hereof, in consideration of the payment of the premium and of the statements contained in the Declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

Insuring Agreements

I. Coverage A—Bodily Injury Liability—To pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of services, because of bodily injury, including death at any time resulting therefrom, sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of the automobile.

Coverage B—Property Damage Liability—To

Exhibit A (Continued)

pay on behalf of the Insured all sums which the Insured shall become obligated to pay by reason of the liability imposed upon him by law for damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of the automobile.

II. Defense, Settlement, Supplementary Payments—It is further agreed that as respects insurance afforded by this policy, the Company shall

(a) defend in his name and behalf any suit against the Insured alleging such injury or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the Company shall have the right to make such investigation, negotiation and settlement of any claim or suit as may be deemed expedient by the Company;

(b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, but without any obligation to apply for or furnish such bonds, all costs taxed against the Insured in any such suit, all expenses incurred by the Company, all interest accruing after entry of judgment until the Company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the Company's liability thereon, and any expense incurred by the

Exhibit A (Continued)

Insured, in the event of bodily injury, for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

The Company agrees to pay the expenses incurred under divisions (a) and (b) of this section in addition to the applicable limit of liability of this policy.

III. Definition of "Insured"—The unqualified word "Insured" wherever used, includes not only the named Insured but also any person while using the automobile and any person or organization legally responsible for the use thereof, provided that the declared and actual use of the automobile is "pleasure and business" or "commercial," each as defined herein, and provided further that the actual use is with the permission of the named Insured. The provisions of this paragraph do not apply:

(a) to any person or organization with respect to any loss against which he has other valid and collectible insurance;

(b) to any person or organization with respect to bodily injury to or death of any person who is a named Insured;

(c) to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station, or public parking place, with respect to any accident arising out of the operation thereof:

(d) to any employee of an Insured with respect

Exhibit A (Continued)

to any action brought against said employee because of bodily injury to or death of another employee of the same Insured injured in the course of such employment in an accident arising out of the maintenance or use of the automobile in the business of such Insured.

IV. Automatic Insurance for Newly Acquired Automobiles—If the named Insured who is the owner of the automobile acquires ownership of another automobile, such insurance as is afforded by this policy applies also to such other automobile as of the date of its delivery to him, subject to the following additional conditions: (1) if the Company insures all automobiles owned by the named Insured at the date of such delivery, insurance applies to such other automobile, if it is used for pleasure purposes or in the business of the name Insured as expressed in the Declarations, but only to the extent applicable to all such previously owned automobiles; (2) if the Company does not insure all automobiles owned by the named Insured at the date of such delivery, insurance applies to such other automobile, if it replaces an automobile described in this policy and may be classified for the purpose of use stated in this policy, but only to the extent applicable to the replaced automobile; (3) the insurance afforded by this policy automatically terminates upon the replaced automobile at the date of such delivery; and (4) this agreement does not apply (a) to any loss against which

Exhibit A (Continued)

the named Insured has other valid and collectible insurance, nor (b) unless the named Insured notifies the Company within ten days following the date of delivery of such other automobile, nor (c) except during the policy period, but if the date of delivery of such other automobile is prior to the effective date of this policy the insurance applies as of the effective date of this policy, nor (d) unless the named Insured pays any additional premium required because of the application of this insurance to such other automobile. [17]

V. Policy Period, Territory, Purposes of Use—This policy applies only to accidents which occur during the policy period, while the automobile is within the United States in North America (exclusive of Alaska) or the Dominion of Canada, or while on a coastwise vessel between ports within said territory, and is owned, maintained and used for the purposes stated as applicable thereto in the Declarations.

EXCLUSIONS

This policy does not apply:

(a) while the automobile is used in the business of demonstrating or testing, or as a public or livery conveyance, or for carrying persons for a consideration, or while rented under contract or leased, unless such use is specifically declared and described in this policy and premium charged therefor;

(b) while the automobile is used for the towing

Exhibit A (Continued)

of any trailer not covered by like insurance in the Company; or while any trailer covered by this policy is used with any automobile not covered by like insurance in the Company;

(c) while the automobile is operated by any person under the age of fourteen years, or by any person in violation of any state, federal or provincial law as to age applicable to such person or to his occupation, or by any person in any prearranged race or competitive speed test;

(d) to any liability assumed by the Insured under any contract or agreement; or to any accident which occurs after the transfer during the policy period of the interest of the named Insured in the automobile, without the written consent of the Company;

(e) to bodily injury to or death of any employee of the Insured while engaged in the business of the Insured, other than domestic employment, or in the operation, maintenance or repair of the automobile; or to any obligation for which the Insured may be held liable under any workmen's compensation law;

(f) to property owned by, rented to, leased to, in charge of, or transported by the Insured.

CONDITIONS

1. Automobile Defined—Two or More Automobiles—Except where specifically stated to the contrary, the word “automobile” wherever used in this

Exhibit A (Continued)

policy shall mean the motor vehicle, trailer or semi-trailer described herein; and the word "trailer" shall include semi-trailer. When two or more automobiles are insured hereunder, the terms of this policy shall apply separately to each but as respects limits of bodily injury liability and property damage liability a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile.

2. Limits of Liability—Coverage A—The limit of bodily injury liability expressed in the Declarations as applicable to "each person" is the limit of the Company's liability for all damages, including damages for care and loss of services, arising out of bodily injury to or death of one person in any one accident; the limit of such liability expressed in the Declarations as applicable to "each accident" is, subject to the above provision respecting each person, the total limit of the Company's liability for all damages, including damages for care and loss of services, arising out of bodily injury to or death of two or more persons in any one accident.

3. Limits of Liability—Coverages A and B—The inclusion herein of more than one Insured shall not operate to increase the limits of the Company's liability.

4. Financial Responsibility Laws—Any insurance provided by this policy for bodily injury liability or property damage liability shall conform to the provisions of the motor vehicle financial responsibility

Exhibit A (Continued)

law of any state or province which shall be applicable with respect to any such liability arising from the use of the automobile during the policy period, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The Insured agrees to reimburse the Company for any payment made by the Company on account of any accident, claim or suit, involving a breach of the terms of this policy and for any payment the Company would not have been obligated to make under the provisions of this policy except for the agreement contained in this paragraph.

5. Notice of Accident—Claim or Suit—Upon the occurrence of an accident written notice shall be given by or on behalf of the Insured to the Company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the Insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the name and address of the injured and of any available witnesses. If claim is made or suit is brought against the Insured, the Insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.

6. Assistance and Cooperation of the Insured—The Insured shall cooperate with the Company and, upon the Company's request, shall attend hearings

Exhibit A (Continued)

and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits and the Company shall reimburse the Insured for any expense, other than loss of earnings, incurred at the company's request. The Insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of the accident.

7. Action Against Company—No action shall lie against the Company unless, as a condition precedent thereto, the Insured shall have fully complied with all the conditions hereof, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant, and the Company, nor in either event unless suit is instituted within two years and one day after the date of such judgment or written agreement.

Any person or his legal representative who has secured such judgment or written agreement shall thereafter be entitled to recover under the terms of this policy in the same manner and to the same extent as the Insured. Nothing contained in this policy shall give any person or organization any right to join the Company as a co-defendant in any action against the Insured to determine the Insured's liability.

Exhibit A (Continued)

Bankruptcy or insolvency of the Insured shall not relieve the Company of any of its obligations hereunder.

8. Other Insurance—If the named Insured has other insurance against a loss covered by this policy, the Company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability expressed in the Declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

9. Subrogation—In the event of any payment under this policy, the Company shall be subrogated to all the Insured's rights of recovery therefor and the Insured shall execute all papers required and shall do everything that may be necessary to secure such rights.

10. Changes—No notice to any agent, or knowledge possessed by any agent or by any other person shall be held to effect a waiver or change in any part of this policy nor estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part hereof, signed by the President, a Vice President, Secretary or Treasurer of the Company.

11. Assignment—No assignment of interest under this policy shall bind the Company until its consent is endorsed hereon; if, however, the named Insured shall die or be adjudged bankrupt or in-

Exhibit A (Continued)

solvent within the policy period, this policy, unless canceled, shall, if written notice be given to the Company within thirty days after the date of such death or adjudication, cover (1) the named Insured's legal representative as the named Insured, and (2) subject otherwise to the provisions of Paragraph III, any person having proper temporary custody of the automobile, as an Insured, until the appointment and qualification of such legal representative, but in no event for a period of more than thirty days after the date of such death or adjudication.

12. Cancellation—This policy may be canceled by the named Insured by mailing written notice to the Company stating when thereafter such cancellation shall be effective, in which case the Company shall, upon demand, refund the excess of premium paid by such Insured above the customary short rate premium for the expired term. This policy may be canceled by the Company by mailing written notice to the named Insured at the address shown in this policy stating when not less than five days thereafter such cancellation shall be effective, and upon demand the Company shall refund the excess of premium paid by such Insured above the pro rata premium for the expired term. The mailing of notice as aforesaid shall be sufficient proof of notice and the insurance under this policy as aforesaid shall end on the effective date and hour of cancellation stated in the notice. Delivery of such written notice either by the named Insured or by the Com-

Exhibit A (Continued)

pany shall be equivalent to mailing. The Company's check or the check of its representative similarly mailed or delivered shall be a sufficient tender of any refund of premium due to the named Insured. If required by statute in the state where this policy is issued, refund of premium due to the named Insured shall be tendered with notice of cancelation when the policy is canceled by the Company and refund of premium due to the named Insured shall be made upon computation thereof when the policy is canceled by the named Insured.

13. Declarations—By acceptance of this policy the named Insured agrees that the statements in the Declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations, and that this policy embodies all agreements existing between himself and the Company or any of its agents relating to this insurance.

In witness whereof, the Bankers Indemnity Insurance Company has caused this policy to be signed by its President and Secretary, but the same shall not be binding unless countersigned by an authorized agent of the Company.

H. P. JACKSON,

President

J. C. MONTGOMERY,

Secretary

[Endorsed]: Railroad Commission. Filed Jul. 12, 1940.

[Endorsed]: Filed May 6, 1941. [18]

[Title of District Court and Cause.]

ANSWER OF DEFENDANTS EUGENE J.
WESTPHALEN AND AETNA CASUALTY
AND SURETY COMPANY

Defendants Eugene J. Westphalen and Aetna Casualty and Surety Company, a corporation, (without waiving the right of either of them to move for a dismissal of the above-entitled action) do hereby answer the complaint of plaintiff on file herein, and for answer thereto admit, deny and allege as follows, to-wit:

I.

Allege that these defendants and each of them have no information or belief sufficient to enable them to answer the allegations contained in said complaint in Paragraphs I, V, VI, VII, VIII and XI of said complaint, and basing their denials on such want of information or belief deny each and all of the allegations contained in said Paragraphs I, V, VI, VII, VIII and XI, both [19] generally and specifically.

II.

Admit the allegations contained in Paragraphs II, III, IV and IX of said complaint.

III.

Answering the allegations contained in Paragraph X of said complaint, these answering defendants admit the allegations of controversy therein

alleged as to the contentions of these answering defendants, but in this connection these defendants allege that no action for damages resulting from said collision has yet been commenced; allege that as to all other allegations contained in said Paragraph X, these answering defendants have no information or belief, and basing their denials on such want of information or belief deny each and all of the other allegations contained in said Paragraph X, both generally and specifically.

IV.

Allege that at the time of said collision at said point four and one-half miles north of said Willits, the said point of collision was less than one hundred air line miles from Novato; allege that these defendants are informed and believe and basing their allegations on such information and belief allege that at the time and place of said collision referred to in said complaint that the truck and trailer therein referred to were then and there operated at said location with the express consent of plaintiff; allege that these defendants are further informed and believe and basing their allegations on such information and belief allege that no notice was given to the Railroad Commission of the State of California within ten days prior to the date of such accident or at any other date prior to the time of said accident that said insurance policy had terminated or become void; allege further on such information and belief that said insurance policy

was at the [20] time of said collision in full force and effect.

V.

These answering defendants each deny each and all of the allegations in said complaint contained which are not hereinabove specifically admitted or specifically denied.

Whereupon, these defendants each pray that said action be dismissed, that plaintiff take nothing herein, that these defendants recover their costs of suit herein expended, and for such other and further order as may be proper in the premises.

CHARLES M. MANNON

IRVING M. BRAZIER

Attorneys for said answering
defendants.

State of California,
County of Mendocino—ss.

Irving M. Brazier, being first duly sworn, deposes and says:

That he is an attorney at law duly admitted to practice before the within entitled Court and before all Courts of the State of California, and has his office in Savings Bank Building, City of Ukiah, County of Mendocino, State of California, and is one of the attorneys for defendants appearing by the within entitled answer; that said appearing defendants are each absent from the County of Mendocino, where affiant has his office, and for that rea-

son this verification is not made by said defendants and is made by affiant upon behalf of said defendants and each of them; that affiant has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

IRVING M. BRAZIER

Subscribed and sworn to before me this 21st day of May, 1941.

[Seal]

HILDA B. MANNON

Notary Public in and for the County of Mendocino,
State of California.

(Receipt of Service.)

[Endorsed]: Filed May 22, 1941. [21]

[Title of District Court and Cause.]

TEMPORARY INJUNCTION

This cause came on regularly to be heard at this term upon the motion of plaintiff in said cause for a temporary injunction upon plaintiff's verified complaint and Petition for Declaratory Judgment and upon the motion to dismiss of defendants Eugene J. Westphalen, Charles Zanella, and Aetna Casualty and Surety Co., a corporation, and the matter having been argued by counsel for the parties, and it appearing that the issuance of a temporary injunction is necessary to prevent irreparable loss and damage to plaintiff herein and to prevent impairment of the exercise of the court's jurisdiction herein or the enforcement of its orders:

It Is Hereby Ordered, Adjudged and Decreed that a [22] temporary injunction be and the same hereby is granted plaintiff against the defendants above named, and each of them, and their respective agents, servants, assigns and attorneys, and anyone acting by, through or for them, restraining them, and each of them, from taking any further proceedings for any judgment, or judgments, against Fred E. Tunzi, Julius Peterson and Denman R. Curry, or any or either of them, based upon any bodily injuries or property damages or otherwise, due to or arising from that certain collision alleged in plaintiff's said verified complaint and Petition for Declaratory Judgment and from taking any proceedings for the purpose of imposing any liability upon plaintiff herein on account of any judg-

ment or judgments, that may be rendered in consequence of said collision.

It Is Further Ordered that this temporary injunction remain in full force and effect until final hearing and determination of this cause and until further order of this Court.

Dated: July 24, 1941.

A. F. ST. SURE,
District Judge.

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

Attest:

[Seal]

WALTER B. MALING,
Clerk, District Court of the
U. S., Northern district of
California.

By WM. J. CROSBY,
Deputy Clerk.

[Endorsed]: Filed July 24, 1941. [23]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT FRED E. TUNZI

Defendant, Fred E. Tunzi, does hereby answer the complaint of plaintiff on file herein and for answer thereto, admits, denies and alleges as follows, to-wit:

I.

Answering the allegations of Paragraph VI commencing with the word "that" on line 3, page 4, and continuing down to and including the word "California" on page 4, line 10, this defendant denies that any of the vehicles described in said allegation were on or about the 8th day of December, 1940, or at any time or at all rented under a contract or leased to defendant, Denman R. Curry.

II.

Answering the allegations of Paragraph VII of said complaint, this defendant denies each and every, all and singular, generally and specifically the allegations [24] therein contained.

III.

Answering the allegations of Paragraph VIII, this defendant denies each and every, all and singular, generally and specifically the allegations contained commencing with the word "that" on page 4, line 26, down to and including the word "California" on page 5, line 6; further answering said paragraph this defendant admits that a trip was made from Napa to San Diego for the purpose of hauling basalt bricks but alleges that this trip was made with the knowledge of plaintiff and without any objection on the part of plaintiff; further alleges that any other trips alleged to have been made in said paragraph, if made at all, were made with the knowledge of plaintiff and with the consent of

plaintiff; defendant has no information or belief on the subject of the trips described in the last sentence in Paragraph VIII sufficient to enable him to answer and basing his denial on want of such information or belief, denies each and every, all and singular, generally and specifically the allegations in the last sentence of Paragraph VIII.

IV.

Answering the allegations of Paragraph XI commencing with the word "because" on line 17, page 7, down to and including the word "policy" on page 8, line 7, this defendant denies each and every, all and singular, generally and specifically the allegations therein contained.

As and for a Further, Separate and Distinct Defense, This Defendant Alleges:

I.

That the place of collision described in the complaint is less than one hundred (100) air line miles from [25] Novato and further alleges that no notice was ever given by plaintiff to the Railroad Commission of the State of California to the effect that the automobile policy issued by plaintiff had terminated or had become void.

Wherefore, this defendant prays that said action be dismissed, that plaintiff take nothing herein, and that this defendant have his costs of suit herein incurred.

Dated: June 19th, 1941.

JOHN B. LOUNIBOS,

LE ROY J. LOUNIBOS,

Attorneys for defendant, Fred
E. Tunzi, Petaluma, Calif.

(Verification.)

[Endorsed]: Filed Jun. 21, 1941. [26]

[Title of Court and Cause.]

ANSWER OF DEFENDANT,
JULIUS PETERSEN

Defendant, Julius Petersen, does hereby answer the complaint of plaintiff on file herein and for answer thereto, admits, denies and alleges as follows, to-wit:

I.

Answering the allegations of Paragraph VIII this defendant alleges that he has no information or belief on the subject sufficient to enable him to form an answer and basing his denial upon want of information or belief, denies each and every, all and singular, generally and specifically the allegations therein contained.

II.

Answering the allegations of Paragraph IX this defendant alleges that he has no information or belief on the subject sufficient to enable him to form

an answer and basing his denial upon want of information or belief, denies each and every, all and singular, generally and specifically the allegations therein contained.

III.

Answering the allegations of Paragraph X, this defendant alleges that he has no information or belief on the subject sufficient to enable him to form an answer and basing his denial upon want of information or belief, denies each and every, all and singular, generally and specifically the allegations therein contained. [27]

IV.

Answering the allegations of Paragraph XI, this defendant alleges that he has no information or belief on the subject sufficient to enable him to form an answer and basing his denial upon want of information or belief, denies each and every, all and singular, generally and specifically the allegations therein contained.

As and for a Further, Separate and Distinct Defense to Plaintiff's Cause of Action, This Defendant Alleges:

I.

That he has not had any interest in the vehicles described in said complaint and has not had possession of said vehicles at any time subsequent to the middle of December, 1940.

Wherefore, this defendant prays that said action

be dismissed, that plaintiff take nothing herein, and that defendant have his costs of suit herein incurred.

Dated: June 19th, 1941.

JOHN B. LOUNIBOS,
LE ROY J. LOUNIBOS,

Attorneys for defendant, Julius Petersen, Petaluma, Calif.

(Verification.)

[Endorsed]: Filed June 21, 1941. [28]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT,
DENMAN R. CURRY

Defendant, Denman R. Curry, does hereby answer the complaint of plaintiff on file herein and for answer thereto, admits, denies and alleges as follows, to-wit: [29]

I.

Answering the allegations of Paragraph IV commencing with the word "that", on line 3, page 4, and continuing down to and including the word "California" on page 4, line 10, this defendant denies that any of the vehicles described in said allegation were on or about the 8th day of December, 1940, or at any time, or at all, rented under contract or leased to defendant, Denman R. Curry, by defendant, Fred E. Tunzi, or by any person at all.

II.

Answering the allegations of Paragraph VII, this defendant denies each and every, all and singular, generally and specifically the allegations therein contained.

III.

Answering the allegations of Paragraph VIII, this defendant denies each and every, all and singular, generally and specifically the allegations therein contained commencing with the word "that" on page 4, line 26, down to and including the word "California" on page 5, line 6; further answering said paragraph this defendant admits a trip was made from Napa to San Diego for the purpose of hauling basalt rocks but alleges that this trip was made with the knowledge and consent of plaintiff and without any objection on the part of plaintiff; denies that the distances described in said paragraph exclusive of the trip to San Diego were in excess of one hundred (100) air line miles, and further alleges that any other trips described in said paragraph, if made at all, were made with the knowledge and with the consent of plaintiff, and further denies all other allegations in said paragraph not herein specifically denied.

IV.

Answering the allegations of Paragraph XI, commencing [30] with the word "because" on line 17, page 7, down to and including the word "policy" on page 8, line 7, this defendant denies each and

every, all and singular, generally and specifically the allegations therein contained.

As and for a Further, Separate and Distinct Defense, This Defendant Alleges:

I.

That the place of collision described in the complaint is less than one hundred (100) air line miles from Novato and further alleges that no notice was ever given by plaintiff to the Railroad Commission of the State of California to the effect that the automobile policy issued by plaintiff had terminated or had become void.

Dated: July 10th, 1941.

LE ROY LOUNIBOS,

JOHN B. LOUNIBOS,

Attorneys for defendant, Den-
man R. Curry, Petaluma,
California. [31]

State of California,
County of Sonoma—ss.

John B. Lounibos, being first duly sworn, deposes and says: That he is an attorney at law duly admitted to practice before the within entitled court and before all Courts of the State of California, and has his office in the Realty Building, 32 Washington Street, Petaluma, County of Sonoma, State of California, and is one of the attorneys for the defendant, Denman R. Curry, appearing by the within entitled answer; that said appearing defen-

dant is absent from the County of Sonoma, where affiant has his office, and for that reason this verification is not made by said defendant and is made by affiant upon behalf of said defendant; that affiant has read the foregoing answer and knows the contents thereof, and that the same is true to the best of his knowledge, information and belief.

JOHN B. LOUNIBOS.

Subscribed and sworn to before me this 10th day of July, 1941.

[Seal]

U. H. TOMASINI,

Notary Public in and for the
County of Sonoma, State of
California.

[Endorsed]: Filed July 11, 1941. [32]

[Title of District Court and Cause.]

STIPULATION RE ANSWER OF WEST-
PHALEN AND AETNA CASUALTY AND
SURETY CO.

It is hereby stipulated that the answer to plaintiff's complaint in the above-entitled action filed by the defendants Eugene J. Westphalen and Aetna Casualty and Surety Company, a corporation, at the time of said defendants filing their motion to dismiss said action, shall be deemed the answer of said defendants and each of them to plaintiff's complaint with the same force and effect as though said answer were served and filed subsequent to the denial of said motion to dismiss, and shall stand

as the answer of said defendants and each of them to said complaint.

Dated: July 19, 1941.

CHARLES B. MORRIS,
CARROLL B. CRAWFORD,

Attorneys for Plaintiff.

MANNON & BRAZIER,

Attorneys for said defendants

Eugene J. Westphalen and
Aetna Casualty and Surety
Company.

[Endorsed]: Filed July 22, 1941. [33]

[Title of District Court and Cause.]

ANSWER OF DEFENDANT,
CHARLES ZANELLA

Now comes Charles Zanella and answering the Complaint of plaintiff herein, admits, alleges, and denies as follows:

1.

Alleges that this defendant has no information or belief sufficient to enable him to answer the allegations contained in said complaint in paragraphs I, V, VI, VII, VIII and XI of said complaint, and basing his denial on such want of information or belief, denies each and all of the allegations [34] contained in said Paragraphs I, V, VI, VII, VIII and XI, both generally and specifically.

2.

Admits the allegations contained in Paragraphs II, III, IV and IX of said complaint.

3.

Answering the allegations contained in Paragraph X of said complaint, this defendant admits the allegations of controversy therein alleged as to the contentions of this defendant, and defendant alleges that as to all other allegations contained in said Paragraph X, this defendant has no information or belief, and basing his denials on such want of information or belief, denies each and all of the the other allegations contained in said Paragraph X, both generally and specifically.

4.

Alleges that at the time of said collision at said point 4½ miles north of said Willits, the said point of collision was less than one hundred air line miles from Novato; alleges that this defendant is informed and believes, and basing his allegations on such information and belief, alleges that at the time and place of said collision referred to in said complaint that the truck and trailer therein referred to were then and there operated at said location by the insured with the express consent of plaintiff; alleges that this defendant is further informed and believes, and basing his allegations on such information and belief, alleges that no notice was given to the Railroad Commission of the State

of California within ten days prior to the date of such accident, or at any other date prior to the time of said accident that said insurance policy had terminated or become void; alleges further on such information and belief that said insurance [34-A] policy was at the time of said collision in full force and effect.

5.

This answering defendant denies each and all of the allegations in said complaint contained which are not hereinabove specifically admitted or specifically denied.

Wherefore, this defendant prays that said action be dismissed, that plaintiff take nothing herein, that this defendant recover his costs of suit herein expended, and for such other and further order as may be proper in the premises.

TAFT AND SPURR

HENRY C. SPURR

FRANK W. TAFT [35]

State of California,
County of Mendocino—ss.

Charles Zanella, being first duly sworn, deposes and says: That he is one of the defendants in the above entitled action; That he has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge except as to matters which are therein stated on informa-

tion and belief, and as to those matters that he believes it to be true.

CHARLES ZANELLA

Subscribed and sworn to before me this 28th day of July, 1941.

[Seal]

HENRY C. SPURR,

Notary Public in and for the County of Mendocino,
State of California.

[Endorsed]: Filed July 30, 1941. [36]

[Title of District Court and Cause.]

MEMORANDUM AND ORDER

Action for declaratory relief. On July 11, 1940, plaintiff insurance company issued to defendant Fred E. Tunzi an insurance policy, covering bodily injury and property damage liability on two trucks and trailers owned by him, which were then in the possession of Julius Peterson at Novato, California. The insured was a highway carrier under permit from the Railroad Commission. The policy was filed with the Commission on July 12, 1940, pursuant to the requirement of the Highway Carriers Act that the carrier procure and continue in effect during the life of the permit adequate protection against liability for personal bodily [37] injuries, and that such protection be not cancellable on less than ten days' written notice to the Railroad Commission. Attached to the policy was a "Termination of Coverage Endorsement" providing in part:

"It is agreed that such Public Liability

(Bodily Injury Liability) and Property Damage Liability Insurance as is afforded by the policy of which this endorsement is a part shall not terminate or become void for any reason whatsoever, except by the annual expiration of said policy, any statement in the policy or in any endorsement issued in connection therewith to the contrary notwithstanding, until after ten-days' notice thereof in writing shall have been given by the insurer to the Railroad Commission of the State of California at its office in the State Building, San Francisco, California, said period of ten days to commence to run from the date said notice is actually received at said office of the Commission. * * *

“It is further agreed that it is not the intention of this endorsement to alter the exclusions of the policy of which it forms a part.”

It was stipulated at the trial that no notice of cancellation was given to the Railroad Commission by the insurer. Plaintiff does not claim that there was a cancellation, but that the policy did not cover the loss under consideration.

The insured expressly warranted that the trucks and trailers would be principally garaged at Novato, California, and that their regular and frequent use would be confined to the territory within 100 miles of Novato. One of the exclusion clauses contained in the policy read as follows: “This

policy does not apply: (a) while the automobile is used in the business of demonstrating or testing, or as a public or livery conveyance, or for carrying persons for a consideration, or while rented under contract or leased, unless such use is specifically declared and described in this policy and premium charged therefor." [38]

About December 8, 1940, defendant Denman R. Curry took possession of one of the trucks and a trailer covered by the policy and moved them to Napa. Defendant Tunzi testified that about this time he told defendant Petersen to notify the insurance company of the removal of the truck and trailer. There is no record that such notification was given. For a period of about five weeks thereafter the truck and trailer were never garaged at or near Novato. At least four trips were made by defendant Curry outside the 100 mile radius of Novato; two to San Diego and two to Mendocino County. Plaintiff contends there were four trips to Mendocino County, but defendant Curry was unable either to deny or verify this contention because of his uncertainty as to the number of trips he made.

On January 14, 1941, while defendant Curry was returning from a trip to Mendocino County, at a point about four and one-half miles north of Willits, which is outside the 100 mile radius of Novato, an accident occurred involving the truck and trailer which he was driving, and a Pontiac coupe in which defendants Westphalen and Zanella were riding.

Plaintiff insurance company claims that it is not liable for any damages for personal injuries and property damage that may be recovered by defendants Westphalen and Zanella, on the grounds that the warranties relating to the principal garaging of the truck and trailer at Novato, and their regular and frequent use within a 100 mile radius of Novato, were breached; and on the further ground that the [39] truck and trailer were rented under contract or leased to defendant Curry at the time of the accident, and were therefore within the exclusion clause of the policy.

The evidence shows that there was a complete disregard and breach of these two warranties from the time defendant Curry took possession of the truck and trailer until the time of the accident. The policy was not intended to cover the uses to which the truck and trailer were put after December 8.

With regard to the applicability of the exclusion clause, the testimony of defendants Tunzi and Curry, who made the arrangements for Curry's use of the truck and trailer, is vague and unsatisfactory. Although Tunzi and Curry were unable to state with any degree of clearness what the arrangement was between them, financial or otherwise, they both said that Curry was to work for Tunzi and to receive "wages", the amount to depend on the amount of hauling he was able to get. However, the subsequent dealings of these defendants are not consistent with the relationship of

master and servant. According to his testimony, Curry did not keep any accurate record of the trips he made, the business he obtained, or the amount he received; and Tunzi testified that he kept no special "track" of the trips except to look occasionally at the mileage of the truck. Tunzi made some advances to Curry and paid for certain repairs to the truck, and these amounts were returned to him by Curry. They had no final accounting. Tunzi did not direct Curry as to the manner of his operations. Curry acted as an independent contractor throughout. The most [40] logical conclusion to be drawn from the evidence is that Curry was to pay as consideration for the use of the truck and trailer a portion of the profits from his hauling business. This manner of payment would not be inconsistent with a contract of rental or hire. The result was that the possession and undirected use of the truck was permitted by the insured to a stranger to the policy, a situation that the plaintiff guarded against in the exclusion clause.

The plaintiff made a *prima facie* case that the truck and trailer were "rented under contract or leased" by offering proof that Tunzi gave Curry temporary possession of them for a period of five weeks and received a profit from their use. Section 1925 of the California Civil Code provides that "Hiring is a contract by which one gives to another the temporary possession and use of property, other than money, for reward, and the latter agrees

to return the same to the former at a future time.”

A general and salutary rule of evidence is that the burden of producing evidence should be placed on the party best able to sustain it; that the burden of evidence as to an issue may rest on the party having the greater means of knowledge; and that the court will more readily hold that a party has sustained the burden of evidence where the issue is one as to which the evidence is peculiarly within the adverse party's knowledge or control. 31 C.J.S. §113. Defendants have failed to sustain this burden.

I conclude that the truck and trailer were “rented under contract or leased” at the time of the accident, and were therefore not covered by the policy. It is therefore [41]

Ordered:

1. Plaintiff is entitled to a declaratory judgment that it is not liable to defendants or any of them under said policy of automobile liability insurance;

2. The preliminary injunction will be made permanent.

Plaintiff may submit findings of fact and conclusions of law and judgment in accordance with this memorandum and order.

Dated: June 16, 1942.

A. F. ST. SURE,

United States District Judge

[Endorsed]: Filed June 16, 1942. [42]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above cause came on regularly for trial on the 25th day of March, 1942, before the Court sitting without a jury, Charles B. Morris and Carroll B. Crawford appearing for plaintiff; Lounibos & Lounibos, by John Lounibos, and Bronson, Bronson & McKinnon, by Harold McKinnon, appearing for the defendants Fred E. Tunzi, Julius Petersen, and Denman R. Curry; Mannon & Brazier, by Irving M. Brazier, appearing for the defendants Eugene J. Westphalen and Aetna Casualty and Surety Company, a corporation, and Taft & Spurr, by Frank W. Taft, appearing for [43] the defendant Charles Zanella; and evidence both oral and documentary having been introduced, briefs for plaintiff and defendants having been filed and the cause having been by the Court duly ordered submitted for decision, the Court now makes its findings of fact as follows:

FINDINGS OF FACT

I.

That it is true that plaintiff, Bankers Indemnity Insurance Company, was at all times mentioned in the complaint a corporation organized and existing under the laws of the State of New Jersey and duly authorized and licensed to do business within the State of California, and having its principal

place of business within the State of California in the City and County of San Francisco.

II.

That it is true that at all times mentioned in the complaint defendants Eugene J. Westphalen and Charles Zanella were citizens of the State of California and resided at Willits, Mendocino County, California; that defendant Fred E. Tunzi was a citizen of the State of California and resided at or near Petaluma, Sonoma County, California; that defendant Julius Petersen was a citizen of the State of California and resided at or near Novato, Marin County, California; that defendant Denman R. Curry was a citizen of the State of California and resided at or near Napa, Napa County, California; that defendant Aetna Casualty and Surety Company was a corporation organized and existing under the laws of the State of Connecticut.

III.

That it is true that the amount in controversy herein exclusive of interest and costs exceeds the sum of Three Thousand Dollars (\$3000.00). [44]

IV.

That it is true that this suit is brought under and pursuant to the Federal Declaratory Judgment Act (Judicial Code, Section 274d, 28 U. S. C. A., Section 400).

V.

That it is true that on or about the 11th day of

July, 1940, plaintiff issued a policy of automobile liability insurance numbered CB34576 to defendant Fred E. Tunzi; that the policy period was from July 1, 1940, to July 1, 1941, and said policy was in effect from July 1, 1940, to the date of the complaint herein; that in said policy plaintiff agreed with defendant Fred E. Tunzi to pay on behalf of said Fred E. Tunzi, subject to the limits of liability, exclusions, conditions and other terms of said policy, all sums not exceeding Ten Thousand Dollars (\$10,000.00) for each person and not exceeding Twenty Thousand Dollars (\$20,000.00) for each accident, which defendant Fred E. Tunzi should become obliged to pay by reason of the liability imposed upon him by law for damages, including damages for care and loss of service because of bodily injury, and not exceeding Five Thousand Dollars (\$5000.00) because of property damage, sustained by any person or persons caused by accident and arising out of the ownership, maintenance and use of two certain automobiles and two certain trailers described in said policy as (1) 1938 Fageol 6, Serial No. E729, Motor No. 401943; (2) 1937 Reliance Trailer (20 foot) Serial No. 37318; (3) 1928 Fageol Diesel, Serial No. 9143, Motor No. 471215; (4) 1929 Reliance Trailer (20 foot) Serial No. 2631; that said policy provides that said two automobiles and two trailers are to be used for "commercial purposes"; that said policy expressly provides that said automobiles "will be principally garaged and used" in the town of Novato,

California, and further provides that the insurer, plaintiff herein, shall not be liable for loss or damage [45] caused while any automobile involved therein was rented under contract or leased; that by an endorsement appended to said policy and of even date therewith it was specifically provided that in consideration of the premium at which the said policy was issued it was warranted by the insured that, subject to the territorial limitations of said policy, the regular and frequent use of the commercial type vehicles described in such policy "is and will be confined to the territory within 100 miles of Novato"; that the originals of said policy and of said endorsements at the time the complaint herein was filed were on file with the Railroad Commission of the State of California, that a true copy of said policy and said endorsements is attached to the complaint herein, marked "Exhibit A."

VI.

That it is true that on July 1, 1940, when the aforesaid commercial truck and trailer policy No. CB34576 became effective, the trucks and trailers covered thereby were owned by the insured Fred E. Tunzi, who was the legal and registered owner thereof, but said trucks and trailers were in fact being operated by the defendant Julius Petersen in and around the town of Novato, Marin County, California, and their regular and frequent use was within 100 miles thereof; that on or about the 8th day of December, 1940, the truck designated in the

aforesaid policy No. CB34576 as 1938 Fageol 6, Serial No. E729, Motor No. 401943, and bearing California license 1940 No. BE 14682, and 1929
PT

Reliance Trailer Serial No. 2631 were returned to their owner, defendant Fred E. Tunzi, and by him hired, rented under contract or leased to defendant Denman R. Curry of Napa, Napa County, California.

VII.

That it is true that following the hiring, renting under contract or leasing of the said truck and trailer to defendant Denman R. Curry as aforesaid, no alteration or modification was [46] made or requested by the insured in the terms or conditions of said policy No. CB34576, except that on the 2nd day of January, 1941, by a special endorsement made at the request of defendant Fred E. Tunzi, the name of the insured therein was changed by plaintiff to read "Fred E. Tunzi and Julius Petersen"; that said endorsement was filed with the Railroad Commission of the State of California on the 3rd day of January, 1941.

VIII.

That it is true that after said truck and trailer were by their owner, defendant Fred E. Tunzi, hired, rented under contract or leased to defendant Denman R. Curry on or about the 8th day of December, 1940, said truck and trailer were garaged elsewhere than at Novato, California; that during the period from the 8th day of December, 1940,

to the 14th day of January, 1941, the date of the hereinafter mentioned accident, said truck and trailer were regularly and frequently used in making trips to points more than 100 miles from Novato, to wit, two round trips from Napa, California, to San Diego, California, a distance from Novato of more than 450 air line miles each way, and two round trips or more from Napa, California, to Mendocino and Humboldt Counties, California, a distance from Novato of more than 140 air line miles each way, for the purpose of buying grape stakes, hauling them southward to the vicinity of Napa, California, and selling them.

IX.

That it is true that while returning southward from Mendocino County on or about the 14th day of January, 1941, at about the hour of 12:30 A. M., while traversing Highway U. S. 101, commonly known as the Redwood Highway, at a point about $4\frac{1}{2}$ miles north of the town of Willits, Mendocino County, California, said truck and trailer stalled and stopped; that before they were again started a 1937 Pontiac Coupe, California [47] 1940 license No. 45A591, owned and driven by defendant Eugene J. Westphalen and carrying defendant Charles Zanella as a passenger, collided with the rear of said 1929 Reliance Trailer, injuring both Eugene J. Westphalen and Charles Zanella and damaging both the aforesaid 1937 Pontiac Coupe and the said 1929 Reliance Trailer attached to the truck driven by defendant Denman R. Curry.

X.

That it is true that an actual controversy exists between plaintiff and each and every defendant herein as follows: Defendants Fred E. Tunzi, Julius Petersen and Denman R. Curry contend that since the 1938 Fageol 6 truck and 1929 Reliance trailer, Serial No. 2631, involved in the aforesaid accident are named and described in the said policy No. CB34576, plaintiff herein has the obligation under said policy to defend said Fred E. Tunzi, Julius Petersen and Denman R. Curry, or any of them, in any action which may be brought against them, or any of them, because of personal injuries or property damage suffered by said Eugene J. Westphalen and/or Charles Zanella in said accident; further, that defendants Fred E. Tunzi, Julius Petersen, Denman R. Curry, Eugene J. Westphalen and Charles Zanella contend that should it be adjudged in said action or actions that said Fred E. Tunzi, Julius Petersen and Denman R. Curry, or any of them, have any liability to pay any sums to said Eugene J. Westphalen and/or Charles Zanella by reason of the injuries or damages incurred in said accident, then plaintiff herein has the obligation, within the limits of said policy No. CB34576, to pay said sums to Eugene J. Westphalen and/or Charles Zanella in satisfaction of said judgments; that defendants Eugene J. Westphalen and Charles Zanella further claim that under the terms of said policy No. CB34576 and the provisions of Section 11580 of the Insurance Code of the State of Cali-

fornia, if they, or either of them, secure a judgment or judgments against the said Fred E. [48] Tunzi, Julius Petersen and/or Denman R. Curry, as aforesaid, then the said Eugene J. Westphalen and Charles Zanella, or the one of them securing said judgment, will have a right of action against plaintiff herein on said policy, subject to its terms and limitations; that defendant Aetna Casualty and Surety Company, a corporation, claims that defendant Eugene J. Westphalen, at the time of said accident, was an employee of Davis, Skaggs & Co., of Willits, California; that said Davis, Skaggs & Co., were at said time the insured of said Aetna Casualty and Surety Company under a policy of workman's compensation insurance pursuant to the terms of which said Aetna Casualty and Surety Company has become financially responsible for the case of defendant Eugene J. Westphalen as to workman's compensation and medical expenses and is subrogated to the rights of its insured under the terms of the Labor Code of the State of California, of which alleged subrogation defendant Aetna Casualty and Surety Company has duly notified plaintiff herein.

XI.

That it is true that at the time of said accident and for several weeks previously thereto the garaging of the aforesaid truck and trailer was not at or near Novato, Marin County, California, and for a like period the regular and frequent use of said truck and trailer was not confined to the territory

within 100 miles of Novato, as provided by an endorsement to that effect made a part of and issued concurrently with said policy No. CB34576, but on the contrary during the period beginning December 8, 1940, and ending on the date of the accident, January 14, 1941, said truck and trailer were garaged elsewhere than at Novato and were being regularly and frequently used in making trips of more than 100 air line miles from Novato and into territory so far distant therefrom that the premium for like automobile liability insurance was greater than if the operation [49] of said truck and trailer had been confined to territory within 100 miles of Novato.

XII.

That it is true that the place of the collision or accident described in the complaint is more than 100 air line miles from Novato.

XIII.

That it is true that at the time of the collision or accident described in the complaint said truck and trailer were by their owner, defendant Fred E. Tunzi, hired, rented under contract or leased to defendant Denman R. Curry.

XIV.

That it is not true that at any time mentioned in the complaint defendant Denman R. Curry was an employee of defendant Fred E. Tunzi.

XV.

That it is not true that at the time and place of

the accident referred to in the complaint said truck and trailer were operated at said location with the consent of plaintiff.

XVI.

That it is not true that the trips, or any of them, made by defendant Denman R. Curry with the aforesaid truck and trailer more than 100 miles from Novato, or any other trips made with said truck and trailer by defendant Denman R. Curry, were made with the knowledge and/or consent of plaintiff.

XVII.

That it is true that no notice of cancellation of policy No. CB34576 was ever given by plaintiff to the Railroad Commission of the State of California; that plaintiff does not claim that there was a cancellation, but claims that said policy does not cover the loss under consideration. [50]

XVIII.

That a declaratory judgment herein is proper and necessary to determine the legal rights and obligations of the respective parties hereto.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts the Court finds:

I.

That this Court has jurisdiction under the Federal Declaratory Judgment Act (Judicial Code,

Section 274d, 28 U.S.C.A., Section 400) to entertain this suit.

II.

That said truck and trailer at the time of the accident in question were not covered by the said policy of automobile liability insurance No. CB34576.

III.

That plaintiff is entitled to a declaratory judgment that it is not liable to defendants or to any of them under the terms of said policy of automobile liability insurance No. CB34576 for any injuries or damages caused by or arising from that certain accident or collision involving 1938 Fageol 6 truck, Serial No. E729, and 1929 Reliance trailer, Serial No. 2631, owned by defendant Fred E. Tunzi and operated by defendant Denman R. Curry, and 1937 Pontiac Coupe, California 1940 license No. 45A591, owned and operated by defendant Eugene J. Westphalen, which occurred on the 14th day of January, 1941, on Highway U. S. 101, about 4½ miles north of Willits, Mendocino County, California.

IV.

That the preliminary injunction now in force herein was properly allowed by this Court and will be made permanent. [51]

V.

That plaintiff recover its costs of suit herein.

Let judgment be entered accordingly.

Dated, Aug. 4, 1942.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed Aug. 4, 1942. [52]

In the Southern Division of the United States District Court, in and for the Northern District of California.

No. 21865-S

BANKERS INDEMNITY INSURANCE COMPANY, a corporation,

Plaintiff,

vs.

EUGENE J. WESTPHALEN, CHARLES ZANELLA, FRED E. TUNZI, JULIUS PETERSEN, DENMAN R. CURRY, AETNA CASUALTY AND SURETY COMPANY, a corporation,

Defendants.

JUDGMENT AND DECREE

This cause having come on regularly for trial on the 25th day of March, 1942, before the Hon. A. F. St. Sure, without a jury, Charles B. Morris and Carroll B. Crawford appearing as attorneys for plaintiff; Lounibos & Lounibos, by John Lounibos, and Bronson, Bronson & McKinnon, by Harold McKinnon, appearing for defendants Fred E.

Tunzi, Julius Petersen and Denman R. Curry; Mannon & Brazier, by Irvin M. Brazier, appearing for defendants Eugene J. Westphalen and Aetna Casualty and Surety Company, a corporation, and Taft & Spurr, by Frank W. Taft, appearing for [53] defendant Charles Zanella; oral and documentary evidence on behalf of the respective parties having been introduced, plaintiff and defendants having rested, and the cause having been submitted to the Court for consideration and decision, and the Court, after due deliberation, having rendered its decision and filed its findings of fact and conclusions of law and ordered that judgment be entered in accordance with said findings;

It is by the Court hereby Ordered, Adjudged and Decreed:

1. That this Court has jurisdiction under the Federal Declaratory Judgment Act (Judicial Code, Section 274d, 28 U.S.C.A., Section 400) to entertain this suit.

2. That said truck and trailer at the time of the accident in question were not covered by said policy of automobile liability insurance No. CB34576.

3. That plaintiff is not liable to defendants, or to any of them, under the terms of said policy of automobile liability insurance No. CB34576 for any injuries or damages caused by or arising from that certain accident or collision involving 1938 Fageol 6 truck, Serial No. E729 and 1929 Reliance trailer, Serial No. 2631, owned by defendant Fred E. Tunzi and operated by defendant Denman R. Curry, and 1937 Pontiac Coupe, California license No. 45A591,

owned and operated by defendant Eugene J. Westphalen, which occurred on the 14th day of January, 1941, on Highway U. S. 101 about 4½ miles north of Willits, Mendocino County, California.

4. That the preliminary injunction now in force herein was properly allowed by this Court and is hereby made permanent.

5. That plaintiff recover its costs of suit herein, taxed at the sum of \$.....

Dated, Aug. 4, 1942.

A. F. ST. SURE

United States District Judge.

[Endorsed]: Filed Aug. 4, 1942. [54]

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Wednesday, March 25, 1942

Counsel Appearing:

For Plaintiff:

Charles B. Morris, Esq.,
Carroll B. Crawford, Esq.

For Defendant Charles Zanella:

F. W. Taft, Esq.

For Defendants Denman R. Curry, Julius Petersen
and Fred E. Tunzi:

John Lounibos, Esq.,
Harold McKinnon, Esq.

For Defendants Eugene J. Westphalen and Aetna
Casualty and Surety Company:

Irving M. Brazier, Esq.

FRED E. TUNZI,

Called for the Plaintiff; sworn.

Mr. Morris: Q. Mr. Tunzi, you were the owner
of the automobile equipment insured under the
Bankers Indemnity Insurance Company's policy?

A. Yes. [57]

Q. Described in the complaint, here?

A. Yes.

Q. And who was using that equipment at that
time? A. From the beginning?

(Testimony of Fred E. Tunzi.)

Q. From July 1, 1940.

A. Julius Petersen.

Q. Where does Mr. Petersen reside?

A. At Novato.

Q. And who secured this insurance on the equipment?
A. Mr. Petersen.

Q. Mr. Petersen secured it? A. Yes.

Q. Do you know what Mr. Petersen was using that equipment for?
A. Yes.

Q. What was he using it for?

A. For hauling different commodities.

The Court: Name some of them.

A. Hay and feed.

Mr. Morris: Q. Do you know where he was using it, in what vicinity?

A. Well, in the vicinity of Novato.

Q. Now, did he continue to use that equipment for some period of time following July 1?

A. Yes.

Q. How long did he use it?

A. Up to December, sometime.

Q. Well, what time in December?

A. The first part of December.

Q. What happened to it then?

A. Well, it was idle at the time, did not have any more use for it.

The Court: Q. Then what happened?

A. Mr. Curry came along, and he wanted a job, and wanted to run the truck, wanted to use the truck.

(Testimony of Fred E. Tunzi.)

Mr. Morris: Q. About when was this Mr. Curry came along?

A. It was about the first week in December, I imagine.

The Court: Q. The first week in December?

A. Yes.

Mr. Morris: Q. Did you know Mr. Curry before that? A. Yes.

Q. What was the occasion of you and Mr. Curry meeting around the 1st of December?

A. I imagine he was out of work, and he knew I [58] had the truck, and being a truck driver he came to me in order to get something to do.

The Court: Q. What did he say to you and what did you say to him?

A. I, having a truck idle, I said, "I have got a truck."

Q. Mr. Curry came to you, did he?

A. Yes.

Q. What did he say?

A. He said he wanted to run my truck for me.

Q. I do not expect you to remember the exact words, but just give me the substance of what Mr. Curry said to you, and what you said to him. You say you knew Mr. Curry? A. Yes.

Q. And you had a truck which was not being used, and Mr. Curry called upon you, is that correct? A. Yes.

Q. Then what did Curry say, to the best of your recollection?

(Testimony of Fred E. Tunzi.)

A. Well, he wanted to run the truck.

Q. No, what did he say? You say he wanted to run the truck. Did he say, "I want to run your truck," or did he say, "Have you got a truck I can use," or "I want to buy your truck," or anything of that kind?

A. No, he did not say that, he said he wanted to run the truck and make money for me.

Q. Did he say he would like to run the truck and make money for you? A. Yes.

Q. You think that is what he said?

A. Yes.

Q. What did you say?

A. Well, I said I would give him a trial, I had a truck that was idle.

Q. What arrangements, if any, did you make with Mr. Curry?

A. Well, we went right down—in a few days we decided on the day, and we went down to see Mr. Petersen, and to talk it over with Mr. Petersen, and he took the truck and started off to—he had some work that he was going to take care of. [59]

Q. Who was that? A. Mr. Curry.

Q. You talked it over with Petersen. What was said when you talked it over with Petersen, what did you say, what did Curry say, and what did Petersen say? A. I told him——

Q. Told who?

A. Mr. Petersen, that I was going to split the trucks, having two, I was going to split them up

(Testimony of Fred E. Tunzi.)

and give Mr. Curry one, so I could keep them working.

Q. Then what did Petersen say?

A. He said it was perfectly all right.

Q. Anything further said?

A. Well, I told him to notify the insurance company.

Q. Told who?

A. Mr. Petersen, to notify the insurance company of the truck being moved to Napa.

Q. Anything else that you remember?

A. Not in particular.

Q. What did you do after that?

A. Well, he took the truck.

Q. Who took the truck?

A. Mr. Curry took the truck, and went on his way, and I went on home.

The Court: Go ahead, Mr. Morris.

Mr. Morris: Q. When Mr. Curry came to you, where did he see you, what place did he come to, your home? A. Yes.

Q. Did he say anything to you at that time about wanting to buy a truck?

A. Well, not exactly.

Q. You say "not exactly," what did he say about buying a truck?

A. The idea was, there was quite a sum involved in the truck, and he could not buy it, and I knew his circumstances, that he was a truck driver, and he was driving trucks, and that is as far as I talked to him.

(Testimony of Fred E. Tunzi.)

Q. Did he ask you to finance him on the truck?

A. No, I had so much in financing before that, that he wanted to drive, he particularly wanted to drive the truck to make money for me. He [60] knew the setup I had with Petersen.

Q. What did he say about getting possession of these trucks, what proposition did he make to you?

A. He was going to drive the truck and turn everything over to me, you see.

Q. Turn over what to you?

A. Give the shipping orders in my name.

Q. Well, had you shipping orders at the time that he came to you?

A. I got them, I instructed him to get the shipping orders and make them out, because it was through the Railroad Commission and the Board of Equalization, and Petersen instructed us to have those job orders.

The Court: Q. Petersen instructed you what?

A. As to those shipping orders, that we had to have for our records.

Mr. Morris: Q. Did you have any shipping orders at the time that Curry came to you?

A. No.

Q. What shipping orders did you get after Mr. Curry came to you?

A. I think he got them through Mr. Petersen. I got the bills after they were made out by Curry.

Q. Shipping orders for what?

(Testimony of Fred E. Tunzi.)

A. For basaltite material that he was hauling from Napa.

Q. Who got those shipping orders?

A. Mr. Curry made them out.

Q. And that hauling of basaltite rock was to what point?

A. Well, it was to San Diego, or Los Angeles, and Redwood City.

Q. Did Mr. Curry, when he first came to you, tell you that he had an opportunity to haul some basaltite material?

A. Yes.

Q. To Southern California?

A. Yes.

Q. He wanted to buy a truck?

A. He did not say "buy."

Q. What did he say?

A. He said he wanted to run them for me.

Q. He wanted to run the trucks for you?

A. Yes.

Q. And what were you to get out of running the trucks? [61]

A. Well, we never said—I said, "I will give you so much for your work."

Q. How much did you say you would give him?

A. We never set no figure. He was willing to take according to what he could do.

Q. He was going to take the trucks and work them for what he could make out of them: was that your understanding?

A. No, run them for me, and he was going to drive the truck and get the business.

(Testimony of Fred E. Tunzi.)

Q. He was going to get the business?

A. Yes.

Q. And operate your trucks? A. Yes.

Q. How much were you going to get out of it?

A. I was going to get everything except to pay him for his time.

Q. Did you agree on what his time was?

A. No, I did not.

Q. Wasn't the understanding with Mr. Curry that you would go 50/50 on it, after the expenses were deducted?

A. No, we did not say that.

Q. You were going to divide the profits, wasn't that your understanding?

A. We didn't go into just how much, but I said, "You will get your wages," that is what I told him then.

Q. Were you going to guarantee him his wages, whether he made them or not?

A. According to what he made.

The Court: Q. Just what was the arrangement you had? You are very indefinite about it. I would like to know the facts. What was the arrangement you had with Curry?

A. He was going to give them a trial to see how much hauling he could do, and turn it over to me.

Q. What did you agree to pay Curry, if anything? A. I did not agree.

Q. What did you ever pay Curry, if anything?

(Testimony of Fred E. Tunzi.)

A. I gave him some money to start off, I think, I did not give him much.

Q. How much did you give him?

A. I gave him \$5 the first time. [62]

Q. This was your truck? A. Yes.

Q. And you were willing to turn it over to him on that sort of an understanding? A. Yes.

Q. And the only money you paid him was \$5?

A. When he started off.

Q. How much have you received?

A. But I paid all of the expenses to keep the truck in shape so that it would run.

Q. You had the trucks fixed up before you turned them over to him?

A. Yes, put in quite a bit of expense to get them in good shape.

Q. To have them repaired? A. Yes.

Q. Did you have more than one truck repaired?

A. At that time I just had the trailer repaired, more work done on the trailer.

Q. And you turned over the truck and trailer to him? A. Yes.

Q. And you paid him \$5, that is all you ever paid him, and he started work with your truck?

A. Yes.

Q. What did he do?

A. He went and got this hauling of basalite rock.

Q. How much rock did he haul?

A. Well, they sent me a check for \$310 after

(Testimony of Fred E. Tunzi.)

about thirty days.

Q. How many trips did he make to San Diego?

A. Two.

Q. Was that all?

A. That is all I know of. That is all I have bills for.

Q. You have bills for two trips to San Diego, and you received \$310 for that, is that right?

A. Not for the two trips, there were several other trips besides.

Q. What were the other trips?

A. Redwood City.

Q. Redwood City, and what other place?

A. And Davis, I think he made two trips to Davis.

Q. How many trips to Redwood City?

A. One. [63]

Q. One trip to Redwood City, and two trips to San Diego, is that right? A. Yes.

Q. And for all of those trips you received \$310, is that right? A. Yes.

Q. How much did you pay Curry?

A. I did not pay him, I gave him \$25 for those trips.

Q. Is that all you gave Curry, \$5 and \$25, a total of \$30, is that right? A. Yes.

Q. How long did he have the trucks—how long did Curry have the trucks?

A. About two months.

The Court: Anything further?

(Testimony of Fred E. Tunzi.)

Mr. Morris: Q. Did Mr. Curry collect some money that he kept, himself, that he did not turn over to you? A. Yes.

Q. That was for hauling and using these trucks?

A. Yes.

Q. Do you know how much that was that he kept?

A. We never figured the account of hauling these grape stakes, I gave him \$25 to help to buy some grape stakes, and he had other money of mine that he bought grape stakes that he collected.

Q. Then the money, other than this \$30, is money that he earned with these trucks and he kept?

A. We never settled our account on account of this suit, I imagine; he never came around to straighten out the final account. He did pay me one time \$125, I think \$125, I am not sure of the exact amount, but he wrote me a check the day he brought the truck in to Petaluma; the check was over \$100 that he turned in on hauling.

Q. Now, you say that on the day you had the conversation with Petersen and Mr. Curry you turned over this truck and trailer to Mr. Curry?

A. Yes.

Q. And he drove it up to Napa? A. Yes.

Q. When was it you had the repairs made?

A. I am not certain if [64] it was right away, or it was a little later that we had the repairs.

Q. He continued on to use it, then, before you had any repairs made?

(Testimony of Fred E. Tunzi.)

A. Yes, for a few trips, I imagine.

Q. Who paid for those repairs? A. I did.

Q. Did that come out of the receipts that Curry took in for the hauling?

A. No, I paid it out of my own account.

Q. You never had any accounting with Curry on that? A. No, we never settled.

Q. You don't know how much Mr. Curry took in while he was using these trucks for the two months? A. Not accurately.

The Court: Q. About how much?

A. Well, say, \$700.

Q. \$700? A. \$600 or \$700.

Q. \$600 or \$700. Did you keep account of it?

Mr. Lounibos: Yes, we have his books here.

The Court: Perhaps you can refresh his memory on it.

Mr. Lounibos: This record was subpoenaed.

Mr. Morris: Q. Mr. Tunzi, this is a book marked "Denman R. Curry, Truck Account." Was this book kept by you or Mr. Curry?

A. Mr. Curry kept the items; he turned the book over to me to show what he paid out, and I used it for my own records, I have some of my own records in there since then.

Q. Was this book kept by you or Mr. Curry?

A. He kept it to begin with, and after he turned it over to show what expenses he had, I kept it since.

The Court: Q. Does it show the amount of money that Curry turned over to you?

(Testimony of Fred E. Tunzi.)

A. It shows my record of what he paid me.

Mr. Morris: Will you tell what Curry paid you?

A. There was a check from basalite rock for \$310.01, and finally there was \$125, I am not exact on it, it might have been \$135, somewhere [65] in that neighborhood, I did not put it down right away; that is what I received.

Q. From Mr. Curry? A. Yes.

Q. But does this book show how much Mr. Curry took in, altogether, while he was using these trucks?

A. No, it don't.

The Court: As I understand it, this is the account, here. On page 6 there is written in lead pencil, "Received from D. R. Curry."

A. That is what I got from Mr. Curry.

Q. Is this your handwriting? A. Yes.

Q. Basalt rock \$310.01, D. Curry, \$125, Cash received \$435.01. Is that all you got from Curry?

A. That is all.

Q. That is all the cash you got from Curry?

A. That is all the cash.

Q. In the two months? A. Yes.

Q. I thought you said a little while ago that Curry collected \$600 or \$700.

A. I don't know how much he collected, but the total I paid out was \$772.

Q. You paid out \$772? A. Yes.

Q. Whom did you pay that to?

A. I paid Curry, and the trailer company for the repairs on the Reliance trailer after the wreck.

(Testimony of Fred E. Tunzi.)

Q. After the wreck? A. Yes.

Q. What did you pay to Curry?

A. I paid Curry \$25 and \$100.

Q. \$25 and \$100? A. And the \$5 cash.

Q. And \$5 cash? A. Yes.

Q. The total amount of cash you paid Curry was \$130, is that right? A. Yes.

Q. That is all you paid him during the two months? A. That is all.

Q. All he gave you, then, as I understand it, was \$435.01: is that correct? A. Yes. [66]

Q. That is all the money you got out of it?

A. Yes.

Q. What about this statement that you made, that Curry took in \$600 or \$700 in two months?

A. On these grape stakes, I don't know, I never settled the account, I don't know how much he took in, altogether, because he never wound up the account, he never made a final settlement.

Q. There was never a final settlement made between you? A. No.

Q. And you don't know how much he did take in? A. No.

Q. He did not give you any of that money?

A. No.

Q. On the grape stakes, he did not get anything, at all, for that?

A. I got this \$125, it must have come from the grape stakes, some part of it.

Q. The \$125, you think, is from the grape stakes,

(Testimony of Fred E. Tunzi.)

and there was \$310.01 from the Basalt Rock Company? A. Yes.

Mr. Morris: Q. You paid the repair bills on the truck; that is, part of this money you speak of was repairs on the truck? A. Yes.

Q. When did Mr. Curry start hauling grape stakes?

A. I don't know the exact date, but it was after the basalt job.

Q. Do you know about when it was he started to hauling grape stakes?

A. No, I don't, exactly.

Q. Do you know where he was hauling these grape stakes from, what place?

A. I don't know.

Q. Mr. Curry was using his truck and trailer as he saw fit, isn't that correct? A. Correct.

Q. You were not keeping any record of his movements, at all?

A. Every time I would see him I would kind of check down on the mileage just to get an idea.

Q. Of what he was doing? A. Yes.

Q. But you did not keep any track of any particular trips he made, or where he made them?

A. No. [67]

Q. Nor what he was hauling? A. No.

Q. So, you don't know, then, of your own knowledge, what trips he made for grape stakes?

A. No, I do not.

Q. You never had any accounting with him as

(Testimony of Fred E. Tunzi.)

to how much money he made hauling grape stakes, had you? A. No.

The Court: Q. Do you know where he got the grape stakes, where he was purchasing them, if he did purchase them?

A. He told me that he was going up to Mendocino County and hauling grape stakes for the ranches, and I gave him \$25 in order to have enough money to finance purchasing grape stakes.

Q. Where was he to take the grape stakes?

A. To the ranchers around Napa, I presume.

Q. He was going up to Mendocino County and getting them, is that right? A. Yes.

The Court: Is that all?

Mr. Morris: Q. You don't know the people whom he purchased them from, or anything of that kind? A. No.

Mr. Morris: That is all.

Mr. Lounibos: No questions.

Cross-Examination

Mr. Brazier: Q. Mr. Tunzi, all of these arrangements that you had with Mr. Curry were oral, were they not? A. Yes.

Q. Nothing in writing? A. Nothing.

Q. Did the Bankers Indemnity Insurance Company give you any notice of cancellation or termination of this insurance policy? A. No.

Mr. Brazier: That is all. [68]

JOHN R. ANDERSON,

Called for the Plaintiff; sworn.

Mr. Morris: Q. Mr. Anderson, what is your business?

A. I am office manager of the Basalt Rock Company, Inc.

Q. Do you know Denman R. Curry?

A. Yes, I met him on two or three occasions.

Q. What connection, if any, did he have with the Baselite Rock Company?

A. He hauled some of our material.

Q. Do you know with whom that arrangement was made?

A. No, possibly with Mr. Kay. I just handled the accounts in the office.

Q. You just handle the accounts in the office?

A. Yes.

Q. Did you have an account in the office with Denman R. Curry?

A. I have an account here, the account, here, is under the name of D. R. Curry.

Q. Did he do some hauling for you?

A. Yes.

The Court: Q. Is that a ledger sheet?

A. Yes.

Q. Is that the original ledger sheet?

A. Yes.

Q. What does it show?

A. The name is D. R. Curry, and December 13, 1940, Cash payment \$100.

Mr. Morris: Q. What is that payment for?

(Testimony of John R. Anderson.)

A. Our voucher is attached to the check and reads, "Advance on account F. E. Tunzi," I believe it is. That check was payable to Mr. Curry, however. As I remember——

Q. (Interrupting): Tell us what you remember about that.

A. As I remember, before he made the trip to San Diego, I think he came in and wanted some money, he did not have enough money, and wanted some money before he left, it was quite a ways from home, and that was advanced.

Q. \$100 cash was advanced? A. Yes.

Q. Any further payment made to him?

A. In January we closed the [69] account with a check of \$310.01.

Q. \$310.01?

A. Yes, that check was payable to F. E. Tunzi.

Q. Do you know who got that check, whether it was given to Mr. Tunzi or Mr. Curry?

A. I don't know who picked it up at the office, no.

Q. You say the account was in the name of Denman R. Curry? A. D. R. Curry.

Q. What was the connection of Tunzi with the Curry account?

A. Well, as I remember, at the time Mr. Curry came in to get this \$100 advance I went down to the office with him, I am pretty careful, usually, about giving an advance, and he either had an agreement with Mr. Tunzi or was buying the truck—I

(Testimony of John R. Anderson.)

do not remember that he told me that Mr. Tunzi still retained the title to it, and that is the reason I wrote on the voucher "Advance on Tunzi account"; in other words, we were trying to protect our interests. On this I might add there was also a \$7.37 deduction, which was to be deducted.

Q. That was to be deducted?

A. In other words, the total of the hauling was \$417.38.

Q. The check for \$310.01 was made out in Tunzi's name? A. Yes.

Q. And \$100 cash was paid to Curry?

A. To Curry.

Q. Are those all of the items in the account?

A. That is the two items, and then \$7.37, which is deducted from the final payment.

Q. What payment did you deduct it from?

A. Actually, we did not deduct it from the payment; we entered it in the account as a charge for fuel that we furnished the truck, there. I remember then we made a check up for \$310.01, and that closed the account up, after we had charged that \$7.37.

Q. What was the date of that?

A. December 31. That is opposite that date; that means that would cover any trips he had made during [70] the month of December.

The Court: Q. You gave him \$100 cash on December 13?

A. That is right, but under the practice fol-

(Testimony of John R. Anderson.)

lowed we only entered it once a month, and entered it at the end of the month, and it covered all trips during the month.

Mr. Morris: Q. There is no other account subsequent to December 31?

A. This is the entire account.

The Court: Q. Do you know how many trips he made?

A. I do not have that information with me.

Q. More than one?

A. Yes, more than one. It would have to be several trips to make up that amount of money.

Q. Do you know how much rock was involved?

A. I do not believe he hauled rock, I think that he hauled some material to San Diego, and it is possible that he hauled cement from Redwood City.

Q. From Redwood City? A. Yes.

Mr. Morris: I would like to offer that sheet in evidence.

The Court: This is your original ledger sheet, I suppose? A. Yes.

Q. Have you got a copy?

A. No, I have not a copy.

The Court: I do not think you need it in the record. He has read in the items, so I do not think you need it.

Mr. Morris: All right, that is all.

Cross-Examination

Mr. Lounibos: Q. Did you have any conversation with the defendant, F. E. Tunzi, in connection with this transaction?

(Testimony of John R. Anderson.)

A. I do not recall any.

Q. You had never seen Mr. Tunzi up to to-day?

A. I had never known him until he took the stand.

The Court: Q. Your dealings were entirely with Curry? A. Yes. [71]

Q. Did you give the \$310 check to Curry?

A. I could not answer that, we have too many checks go out.

Mr. Lounibos: Q. The check was payable, however, to F. E. Tunzi? A. That is right.

Q. There was deducted before you closed out that account this item of \$7.37? A. Yes.

Q. That is a charge to Tunzi's balance?

A. That was charged in this account.

Q. You would not know anything about the various trips Mr. Curry made, would you, other than what has already been stated?

A. I did not look the records up.

Q. You would not know whether he made two trips to Redwood City for the Baselite Rock Company?

A. No; however, I know for this amount of money he had to make several trips, and I am quite sure, I know when he got the advance he wanted to go to San Diego, and I imagine he made more than one trip to San Diego.

Q. Do you recall, or do you know that he made any trips to Dixon, or Davis?

A. I do not recall.

J. W. KAY,

Called for the Plaintiff; sworn.

Mr. Morris: Q. What is your business, Mr. Kay?

A. I am superintendent of the Basalite Department of the Basalt Rock Company, Inc.

Q. Do you know Denman R. Curry?

A. Yes, I know the gentleman.

Q. How long have you known Mr. Curry?

A. About two years.

Q. Do you know what his business was during that two years?

A. To the best of my knowledge he was a truck driver.

Q. Referring now to the month of December, 1940, you knew Mr. Curry at that time, did you?

A. Absolutely. [72]

Q. And what was your contact with him at that time?

A. Well, we were making shipments of a large consignment of goods at San Diego by truck on a Government project, and there was a hurry, and they wanted delivery as soon as possible, or as fast as possible, and Mr. Curry came into the plant one day and propositioned me about hauling some of the material, and I told him that the job was his if he could get a truck, if he could handle it, and he said he believed he could, and in a day or two he came back and said he had made arrangements for a truck and trailer, and that he would be in the next day or so to take a consignment of goods out.

(Testimony of J. W. Kay)

The Court: Q. How many trips did he make to San Diego?

A. To the best of my knowledge it was two trips.

Q. Did he make any other trips that you know of?

A. It seems to me that he made a trip for a load of cement to Redwood City, and then he made one or two trips over toward Davis.

Q. What was that for?

A. That was for basalite.

Q. Two trips to Davis carrying Basalite?

A. Yes.

Q. Any other trips?

A. No, I think there were about five trips involved, all told.

Q. Altogether?

A. Yes, I think there were about five.

Q. That was the extent of your business with him?

A. Correct.

Mr. Morris: Q. Mr. Kay, do you know where Mr. Curry got this truck and trailer?

A. Well, I understood that he got it from a gentleman by the name of Tunzi, that lived over toward Petaluma.

Q. Did you have any dealings with Mr. Tunzi?

A. None, whatever.

Q. Your agreement for this hauling was with Mr. Curry?

A. With Mr. Curry, correct. [73]

Q. And all of the contacts that you had on the hauling were with Mr. Curry, and Mr. Curry only?

(Testimony of J. W. Kay)

A. Mr. Curry, especially.

Q. You didn't know what his connections with Mr. Tunzi were? A. No.

Q. You made your arrangement and fixed your prices for hauling with Mr. Curry?

A. The prices were fixed by the Railroad Commission, and we paid the Railroad Commission rates, and lived up to their rulings.

Mr. Morris: That is all.

Cross-Examination

Mr. Lounibos: Q. You had charge of issuing shipping orders on this hauling made by Curry, did you not? A. Yes.

Q. You issued shipping orders in triplicate, according to the custom of your place of business?

A. Yes, I guess that is so.

Q. Your shipping orders would show the name of the carrier of your merchandise?

A. They are supposed to, yes.

Q. Were all of these shipping orders issued in the name of F. E. Tunzi?

A. I do not remember.

Q. I am showing you shipping orders Nos. 1, 2, 3, 4, and 5, all apparently issued by Basalt Rock—the name Basalt Rock appears as shipper, and F. E. Tunzi appears as carrier, and I will ask you to examine them; some of them are signed by you. I would ask you if those are the shipping orders involved in the transaction between yourself and Mr. Curry for the month of December, 1940.

(Testimony of J. W. Kay)

A. There is none of them that has my signature on.

Q. One has, if I am not mistaken, that is by Mr. Curry. You were shipper?

A. Basalt Rock Company.

Q. Look over these records issued by Basalt Rock, and would you say that there were five trips made for your company in December?

A. Yes. [74]

Q. *Those* of those trips were made to San Diego?

A. Two of them to San Diego.

Q. And two trips made to Redwood City, a trip down and a trip back?

A. I am not sure whether there were two trips to Redwood City, or one trip, let me see.

Q. Directing your attention to Nos. 4 and 5, that No. 4 dated December 22, shows a load of basalt?

A. That is right.

Q. Shipped to Redwood City?

A. Yes, and a load of cement returned.

Q. That makes a complete trip?

A. That makes a complete trip, yes.

Q. I now direct your attention to bill No. 3, which was, I suppose, issued by you, but the consignee's name is Gordon. Was that trip over to Davis, or Dixon? The consignee's address does not appear, and that is why I ask.

A. Well, I am pretty sure this was the Davis trip, or Dixon trip, although we have no contractor on our list of that name; it must have been one

(Testimony of J. W. Kay)

of the masons, or something like that, on the job.

Q. Then there was the Blumberg trip to Davis, California? A. Yes.

Q. No. 2? A. That is right.

Q. So that we have five shipping orders, two shipping orders showing trips to San Diego, and one trip to Davis, one to Dixon, and one to Redwood?

A. One round trip to Redwood City.

Q. A trip to Redwood City and a trip back?

A. Yes.

Q. Those were all made in December, 1940, and all of the shipping orders show the name of the carrier as F. E. Tunzi? A. That is right.

DENMAN R. CURRY,

Called for the Plaintiff; sworn. [75]

Mr. Morris: Q. You are Denman R. Curry?

A. Yes.

Q. Where do you reside, Mr. Curry?

A. At the present time I live at 129 Hitchborn street, Vallejo.

Q. In the month of December, 1940, where did you live?

A. Most of the time I lived with the truck on the road.

The Court: Q. You are a truck driver?

A. Yes.

(Testimony of Denman R. Curry.)

Mr. Morris: Q. Whose truck were you driving?

A. Tunzi's.

Q. That was in the month of December?

A. Well, it was in the month of December, I don't recall exact dates, but sometime in the month of December.

Q. Did you also have a trailer attached to that truck? A. Yes.

Q. And this truck and trailer, you say, belonged to F. E. Tunzi?

A. To the best of my knowledge, yes.

Q. When did you secure possession of that truck and trailer?

A. I could not give you the exact date, I think somewhere around the 8th or 10th of December.

Q. Of 1940? A. Yes.

Q. What was the reason that you were driving that truck and trailer beginning in December, 1940?

The Court: Q. Under what circumstances did you obtain possession of the truck?

A. Well, I had been wanting to get to work for myself, I had been working for wages for quite some time, and I knew Mr. Tunzi, in Petaluma, and I heard him speak about two trucks and trailers, that he had, and so I was interested in getting them and working them on shares, or working for him on wages, and Mr. Kay, the manager of the Basalt Plant, there, I knew moved a good deal of material, and I went to him and asked him about doing work, hauling material, if I could get a truck,

(Testimony of Denman R. Curry.)

and he told me, well, the first time I spoke to him about it, he [76] told me whenever anything came up worth while he would let me know. And then I heard of the San Diego haul, and I went to him and asked him about it, and he told me if I got a truck and trailer I could go to work, and I went to see Mr. Tunzi, and he said the truck was idle at the time and I could take it and go to work on the haul. I told him a good deal of hauling would later come up the valley, where we could get a back haul of hay, I believed.

Q. What arrangements did you make with Mr. Tunzi about the truck?

A. Well, I will tell you, there was not any definite arrangement made.

Q. Tell me what you said, and what he said.

A. Well, the best I can remember, I asked him about having a truck to use, if he had one, and he said if he could be shown where he could make some money perhaps he could arrange later to sell me a truck, I can't recall the exact words, only that he told me he would give me a truck, that I could go ahead and get what hauling I could and keep track of the work, and we would try to work out something that would be satisfactory to both of us.

Q. Did you have an understanding with him of what you were to receive for your services?

A. Not anything definite, no.

Q. That is so indefinite, I never heard anything like that. You mean to tell me you did not have

(Testimony of Denman R. Curry.)

any understanding with him, at all, of what you were to receive, and what you were to do with the truck, or what he was to receive?

A. I will tell you, as near as I can.

Q. Yes.

A. About the arrangements at the time I took the truck. I went to Mr. Tunzi; I met Mr. Tunzi with my wife, I had my wife with me, and I met Mr. Tunzi at Novato, where he had the trucks with Mr. Petersen, and we spoke about the insurance, and Mr. [77] Petersen said that we could probably work on his insurance, and Mr. Tunzi said that he had a Railroad Commission permit, and that I could work on that, and that after I made a few trips and showed what I could make on the trips, how much money we could make with the trucks, we could settle on what I would have for my wages. In fact, I don't think there was a word said about the wages part, only that I understood I would get something for wages.

Q. You expected to?

A. Sure, I expected to get my wages.

Q. Nothing was said about any amount you were to receive?

A. No, that is right.

Q. Tunzi had the truck and you took it and began hauling, is that right?

A. Yes.

Q. You heard Tunzi's testimony with respect to the amount of money that he gave you?

A. Mr. Tunzi gave me money a couple of different times when I needed money.

(Testimony of Denman R. Curry.)

Q. How much did he give you, in all?

A. I could not be exact.

Q. You don't remember at all?

A. I know that he gave me money a couple of different times.

Q. He said he gave you about \$130.

A. Well, I believe that he gave me that much money.

Q. This check of \$310.01, did you receive that from the Basalt Company?

A. I am not certain about that. I think I told them to mail that check, I could not be sure whether they mailed the check to Mr. Tunzi or whether I picked it up and gave it to him.

Q. In addition to that did you give Tunzi any money?

A. I think at the time I took the truck and trailer back to him I gave him a check of \$100—\$125 or \$135, I don't remember which.

Q. He said \$125. He said that the total amount that he received from the trucking when you had the truck was \$435.01. [78] That would include the \$310.01 from the Basalt Company, and \$125 you gave him.

A. That is correct—I could not be exact, but I think it comes nearly to that.

Q. What did you receive in addition to the \$130 that Tunzi gave you? What else did you receive?

A. It is pretty hard for me to tell you all I received, exactly, as I was buying grape stakes and

(Testimony of Denman R. Curry.)

selling them, and there was a good deal of expense coming out of the trucking, for gasoline, and re-capping tires, and the like of that; I could not be exact as to the amount.

Q. About how much? Did you keep any books on it?

A. Yes, I had some books on it. I had some figures, but I don't know what became of them. I have not kept any track of them.

Q. Do you think you made two or three hundred dollars in addition to the \$125 or \$130 that Tunzi gave you—I mean over costs, I mean net?

A. Yes, I would say that.

Q. Two or three hundred dollars in addition to that? A. Yes.

Q. You never had any settlement with Tunzi?

A. No, we did not.

Mr. Morris: Mr. Curry, you had a talk with Mr. Kay before you got this Tunzi equipment, isn't that true? A. That is right.

Q. And Mr. Kay told you that he had some hauling for you?

A. Not the first time I talked to Mr. Kay, no.

Q. But he did eventually tell you that he had some hauling for you? A. Yes.

Q. And you did not have any equipment at that time? A. No.

Q. What did you tell Mr. Kay? Did you tell him you could get a truck?

A. I told him I would try and get a truck.

(Testimony of Denman R. Curry.)

Q. Then did you go to Mr. Tunzi to get him to finance you on a truck?

A. I think the first time I saw Mr. Tunzi about a truck I did say something to him about financing me on a Ford truck that I thought I could buy, and he said that he had so much money tied up in [79] equipment he could not afford to finance any truck.

Q. Then the conversation drifted around, did it, to this equipment that he had?

A. Yes, I think that is it.

Q. Was that the first time you saw Mr. Tunzi, or some other time?

A. I think that was the first time, that he said—no, I am not certain about that—I don't think that he said that he had equipment at the first time I saw him. I think the next time I saw him, I saw him two or three times, I could not be exact—I knew for some time, and I was over there, I could not be exact whether I saw him two or three times before I got the truck, I would not be sure.

Q. Those two or three times before you got the truck, what did you see him for?

A. I saw him first about financing the Ford truck, but he said he could not finance it. The next time I think is when he told me that he would see Mr. Petersen and find out, he did not think the truck was working, and if I could get the work he would let me know. I think that was the second time, and then he said, "If I can get the truck you can come over and see me Sunday at Novato," and

(Testimony of Denman R. Curry.)

I think the third time I saw him was when I saw him at Novato.

Q. Had you got the work by then, the third time?

A. Yes, I had gotten the work.

Q. This was some hauling for the Basalt Company?

A. Yes.

Q. You also had in mind you might be able to do some hauling in the valley, later?

A. Later on.

Q. Later on in the month?

A. Yes.

Q. Did you tell Mr. Tunzi that?

A. I don't know exactly whether I did at Novato. I know that I said something, I don't know when. I told him that I understood the Bay Shore had a lot of material to go up to the Sacramento Valley, and that we could [80] probably haul hay, I merely felt that. I don't know whether there was much conversation on that point, or not.

Q. What did Mr. Tunzi say about letting you have this truck and trailer?

A. As I told you, I think I have tried to explain, as near as I could, that was the conversation that had taken place.

Q. Did he tell you at that time when you took the truck and trailer, what you could do with it?

A. I believe he did.

Q. And how you were going to pay for the use of his truck?

A. Well, I don't know that there was anything

(Testimony of Denman R. Curry.)

said about my paying for the use of the truck. I, of course, knew of two or three truck owners that have men working on them on a share basis for Basalt rock, and who pay them for their wages according to what they make. I was under the impression that we would get together Mr. Tunzi and I, after I made a few trips, and settle definitely the price that I was to get for my wages, but there was never, to my knowledge, mention of any definite wage that I was to get at the time I took the truck.

Q. There was nothing definite, that all depended on what you were able to earn?

A. That is what I understood, anyway.

Q. After you had deducted the expenses what were you to do with the profits?

A. Well, there was nothing definite on that. I was going on my own, on what I had in my mind to hold out at the end of the hauling, that was what was on my mind. What he had on his mind, I don't know.

Q. That you were to divide the profits after the expenses had been paid?

A. That was my thought.

Q. As far as any agreement was made, that was the agreement, is that right?

A. There was not any definite agreement of that kind.

Q. Mr. Tunzi told you to take the equipment and do what you could [81] with it?

A. That is it.

(Testimony of Denman R. Curry.)

Q. Now, did you divide the profits?

A. As I say, we never made any definite division; we never settled it to that extent.

The Court: Q. Why haven't you had a settlement with Tunzi?

A. Well, that was our personal business.

Q. I know, but I would like to know why you did not settle.

A. I can tell you my point of view.

Q. Yes.

A. I took the truck and told Mr. Tunzi that I would try and run it, and take care of it through the winter, and there would not be much money to be made through the winter, and when summer came I thought there would be plenty of work that we could do and get a good deal of hauling both ways, and he was not satisfied with the money that I brought in, and he asked for the truck back, and I had some money on hand at the time I turned the truck over to him, because he wanted it back, that I never turned in. I considered that was mine.

Q. Did you tell him what you had?

A. I did not. I told him I would give him back the cash that he advanced me, and I wrote him a check for \$125. That was cash, you understand, that he gave me to buy material.

Q. You returned it to him? A. Yes.

Mr. Morris: Q. As I understand, that is the reason you kept what you took in and gave him \$125 that he advanced?

(Testimony of Denman R. Curry.)

A. No, I gave him \$125 that he gave me for the repair of the wreck, and a little money that he gave me in cash to buy grape stakes.

Q. How much money did he give you to buy grape stakes?

A. I could not be exact, whether it was a check or cash I can't remember, he may have a record of that, I believe it was \$25 or \$30.

Q. After you took this truck and trailer from Novato, where did you [82] take it?

A. I took it to Napa.

Q. Where did you keep it?

A. I kept it on the road most of the time.

Q. Did you garage it any place?

A. Only when I was repairing it.

Q. Where was it garaged at any time after it left Novato?

A. Well, I had it for four or five days in a garage in Napa, as I was fixing up the dummy axle on it, but outside of that I don't know that it was in a garage.

Q. You did the repair work?

A. I helped do the repair work, I was working with the mechanic.

Q. Did you pay for that work?

A. Out of the money that I took in, yes.

Q. Out of the money you took in?

A. Yes.

Q. When you were on the road with the truck where did you keep it, where did you garage it?

(Testimony of Denman R. Curry.)

A. I never garaged it.

Q. You slept on it along the road?

A. I slept right alongside, I had my bed with me, I had my camp stuff and bed, and I stayed right with it.

Q. And outside of the four or five days it was in the shop in Napa it was not garaged at all?

A. No.

Q. When you talked about this truck to Mr. Tunzi did you tell him about having the job to haul down to San Diego?

A. I believe I did, I don't know how many there was, but I think I spoke of having a trip to San Diego.

Q. While you had that truck was it ever garaged at Novato? A. Not that I know of.

Q. Now, these grape stakes, when did you start hauling grape stakes?

A. I could not be exact on the date, it was sometime along Christmas time, in December, I don't know exactly, or January, I could not say exactly. I could look at my book and tell [83] you somewhere near the time I did.

Q. Does your book show you?

A. I can fix it by the date, there of my expenses, and tell about when it was. I think I could check back and find out about the date. I am not much of a bookkeeper. I don't think you could figure it out.

The Court: You may look at your book. You may step down while the Grand Jury is coming in.

(Testimony of Denman R. Curry.)

(After recess:)

The Court: Q. Did you look at your book?

A. Yes.

Q. Now, I understand you have looked at the book, and can you give Mr. Morris the date you were going to look up for him?

A. I looked up the items, and I can tell you about two dates, there, I think it was around the 5th of January, I could not say exactly when it was. I know I gave Daircott some expense money, and I see the first I gave him was on the 9th, and then on the 14th I gave him \$10—I could not tell you exactly about it, I was buying these grape stakes and selling them, and I did not keep an exact record on that, as to when I started up there; to tell you the truth, I don't know exactly when it was.

Mr. Morris: Q. You think it was somewhere around the 5th of January?

A. I think it was somewhere around the 1st of January.

Q. Around the 1st of January? A. Yes.

Q. But you did not keep any record of it?

A. No, not of the exact date.

Q. You had a helper, you say, on the truck?

A. He rode with me, I knew him for sometime before, and he was not working, and he said, "I will ride along with you on the truck for company," and I said, "Well, get on and ride along." That is how he came to be with me. [84]

Q. You paid him a little expense money?

(Testimony of Denman R. Curry.)

A. Yes, to live on.

Q. You say you were buying these grape stakes?

A. That is right.

Q. You were buying them up at what part of the State?

A. Well, I could not say exactly all the places that I bought them; I bought some in Mendocino, and I bought some in Humboldt. I think before this accident occurred I made a couple of trips to Piercy, and I don't know, of course, but I am kind of uncertain of exactly how many trips I made up there before this accident occurred, because of buying the stakes and selling them, don't you see, I had no way of keeping an exact record of the dates of the trips.

Q. You were paying for these stakes?

A. That is right.

Q. And hauling them down around Napa?

A. That is right.

Q. What were you doing with them when you got them down to Napa? A. Selling them.

Q. You were selling them?

A. Yes. I would get orders for these grape stakes, and I would go up there and buy them, I would go to the ranchers and get orders, and I would go up and buy them and haul them down, and after I would deliver them they would pay me for them.

Q. What did you do with the money you got for them?

(Testimony of Denman R. Curry.)

A. As I say, I used it for expenses on the truck, and I kept some of it; we never settled for the money that I figured was mine, because the agreement was not definite, and I kept the balance of the money.

Q. Did you have any agreement with Mr. Tunzi to split the profits on those?

A. That was my understanding.

Q. Your understanding was that the profits you made out of the buying and selling of these grape stakes would be divided between [85] the two of you after you deducted the expenses?

A. That is what I understood.

The Court: Q. That is what you understood, that is what you had in your mind?

A. What I had in my mind.

Q. Mr. Tunzi did not say that to you, did he?

A. No.

Q. I understood you to say you had no agreement with him. You were merely to take the truck and make what money you could, and later on you thought you would have a talk about it and come to some agreement?

A. That is right.

Mr. Morris: Q. When Mr. Tunzi turned this truck over to you did he give any instructions about using it?

A. I think he mentioned to be careful of it, take good care of it.

Q. That is all you recall? A. Yes.

(Testimony of Denman R. Curry.)

Q. He did not tell you where you could drive it, or where you could not drive it?

A. Not to my knowledge.

Q. He did not tell you where to garage it, or where not to garage it?

A. Not that I know of.

The Court: Q. What was said about the insurance, if anything?

A. I think that he said that Mr. Petersen had it insured, and he would call up and tell him that I had the truck in my possession, and I think Mr. Tunzi and Mr. Petersen talked about that among themselves more than they were talking to me about insurance.

Q. You did not hear that conversation?

A. Well, I heard part of it, but I could not be exact as to what was said.

Mr. Morris: Q. How long did you keep this truck after the accident?

A. Well, I would not know exactly how long it was. It seems to me like it was about, less than thirty days, I believe.

Q. Had you been driving a truck of your own before you had this arrangement with Tunzi?

A. Had I been driving a truck on my own?

Q. Yes. A. At any time? [86]

Q. Yes.

A. I had sometime in my life been driving on my own.

Q. You said you made some repairs to the tires that you paid for out of the money that you took in.

(Testimony of Denman R. Curry.)

A. Yes, out of the money I took in.

Q. You paid for that out of the money you took in? A. Yes.

Q. Did you make any changes in that truck and trailer after you got it?

A. I went to San Francisco after I made the trip to San Diego, and Mr. Tunzi got a rear end put in under the trailer, and new brakes.

Q. That is, before you started to use it?

A. No, that was after I had used it.

Q. Was that after you made repairs to it in Napa?

A. No, I think that was before the repairs on the truck that I made in Napa. The trailer repairs were made in San Francisco.

Q. Whom did you sell these grape stakes to, if you know?

A. Yes, I sold some of them to a Mrs. Fawver, at St. Helena, and a man that was foreman for Beringer Bros., I don't recall his name, he bought several thousand started a vineyard of his own.

Q. Did Mr. Tunzi get you any customers for hauling? A. I don't recall that he did.

Q. You got all of those?

A. That was the understanding when I took the truck, that that was part of my work.

Mr. Morris: I believe that is all.

Cross Examination

Mr. Lounibos: Q. You referred to a repair bill in San Francisco.

(Testimony of Denman R. Curry.)

A. If I did I misspoke myself, that was not a repair bill, that was a replacement on the trailer.

Q. Who paid for that replacement?

A. Mr. Tunzi.

Q. It was not paid out of the earnings of this venture?

A. No. [87]

Q. But paid for out of his own pocket?

A. Yes, I had nothing to do with that, only I took the rig down there and stayed there until it was finished, and brought it back, and took him the bill, and he wrote a check out to the company.

Q. Do you remember in this conversation with Petersen that you told Petersen to notify the insurance company about the trip to San Diego?

A. I think that we spoke something about notifying the insurance company, there, on that day, but I would not be exact about that. I think Mr. Tunzi and Mr. Petersen did most of the talking about that. We all understood I was to make a trip to San Diego.

Q. Petersen said he would notify the company?

Mr. Morris: I object to what Petersen said.

The Court: Yes. It may go out. We will be in recess until two o'clock.

(A recess was here taken until 2:00 o'clock p. m.) [88]

Wednesday, March 25, 1942
Afternoon Session—2:00 P. M.

DENMAN R. CURRY,

Cross Examination

(Resumed)

Mr. Lounibos: Q. Mr. Curry, you heard the testimony of Mr. Kay, of the Basalt Rock Company, did you? A. Yes.

Q. You heard him describe the different trips, five in all, that you made for the Basalt Rock Company? A. Yes.

Q. His statement was a correct statement of all the trips you made for the Basalt Rock Company in December?

Mr. Morris: I object to that as calling for the opinion and conclusion of the witness.

The Court: Sustained.

Mr. Lounibos: Q. Besides those trips and the trips in the Piercy territory, were there any other trips that you made in December or January, I mean in December, 1940 or January, 1941?

A. If you mean besides the two to San Diego and two to Davis, and the trip to Redwood City, and two trips to Piercy that I made up there, I believe I hauled a small load to Bodega Bay.

Q. Bodega Bay, in what county?

A. Mendocino—I think it is Mendocino.

Q. It is in Sonoma County.

A. Yes, in Sonoma.

Q. You started from Napa?

(Testimony of Denman R. Curry.)

A. I went through Petaluma, over to Bodega Bay.

Mr. Lounibos: I think that is all.

Mr. Morris: That is all. [89]

LEONARD R. TOBIN,

Called for the Plaintiff; Sworn.

Mr. Morris: Q. Mr. Tobin, what is your business?

A. Underwriter for the John E. Perry General Agency.

Q. Is that the general agency that wrote the policy for Mr. Tunzi that is involved in this litigation? A. Yes.

Q. Did you quote the rates on this policy?

A. I quoted them, yes.

Q. Did you give him the rates on this policy?

A. Yes.

Q. What rate based on the use of the truck not to exceed 100 miles from Novato did you quote?

A. On the 100-mile radius?

Q. Yes.

A. It would be the heavy class 3 plus 10 per cent.

Q. That figured how much?

A. Around \$380 and some odd dollars.

Q. Was that the rate at which this policy was written? A. Yes.

(Testimony of Leonard R. Tobin.)

Q. Now, might there have been a different rate for use of these trucks beyond the 100-mile radius?

A. Yes.

Q. I am referring now to this truck and trailer.

A. Yes.

Q. Did this rate you quoted, of \$387, include all of the equipment that is shown on this policy?

A. All of the equipment on that policy.

Q. Now, for coverage beyond 100 miles radius for that equipment is there a different rate?

A. Up to and including 150 miles the rate would be heavy class 3, plus a surcharge of 25 per cent, with a minimum premium of two times the heavy class.

Q. What would that premium be?

A. It would run around \$700.

Q. Beyond 150 miles what would be the premium for that equipment?

A. It would be around \$1000.

Q. That is the same equipment that is described in that policy? A. Yes.

Mr. Morris: That is all. [90]

Cross Examination

Mr. Lounibos: Q. Do you know, Mr. Tobin, whether the Bankers Indemnity Insurance Company is a member of the National Bureau of Casualty & Surety Underwriters?

A. I believe they are.

Q. Is that company what you ordinarily call a board company?

(Testimony of Leonard R. Tobin.)

A. It is a conference company.

Q. Is it a board company, as distinguished from a conference company?

A. Well, I imagine it might be known as that.

Q. In determining the rate that was charged in this particular policy on a radial limit of 100 miles from Novato, do you take into consideration the accident liability loss in San Francisco?

A. It is possible that it would be.

Q. Do you know how the accident loss in San Francisco compares with the accident loss in the rest of California?

A. No, I do not.

Q. You do not know that it is or is not the heaviest ratio for accidents to premiums in the State of California?

A. According to the rate make-up, it should be.

Q. Now, so that I can get the mechanics of this, Mr. Tobin, in determining what you would charge Tunzi on this particular policy, you have a starting point inside of a circle which we will call Novato.

A. Yes.

Q. You are now going to regulate the use of the policy to a radius of 100 miles from that point in the center of the circle?

A. Yes.

Q. In order to determine what rate he is to be charged for this limited right to operate under your policy you do take into consideration the accident factors and ratio of loss in all localities within that circle, don't you?

A. Not in all cases; according to what the party

(Testimony of Leonard R. Tobin.)

is hauling, and who he is hauling for. [91] If he is hauling for one concern, for himself, it would be figured at a rate at where the truck is to be garaged.

Q. In other words, so that I understand you, under this particular policy, in determining what to charge Tunzi, you took the rates of the place where his equipment was to be garaged?

A. Yes.

Q. The Novato rate? A. Yes.

Q. And you did not consider the rate to be charged at any of the other cities or towns through which he might travel if he were to exercise his right to go not more than 100 miles from Novato?

A. That is right.

Q. Now, do you know what differences, if any, there would be between the premium rate to be charged for similar equipment if garaged at Napa, instead of at Novato?

The Court: I do not see how that is material. What is your idea about it?

Mr. Lounibos: My idea is try to find from this expert witness the basis for the increase from \$380 to \$700 once you get beyond the 100-mile limit.

The Court: I do not see how it would aid the Court in deciding this case. It is proper cross-examination, and I do not want to prevent you from pursuing it further if you wish.

Mr. Lounibos: There is an allegation in the complaint, if your Honor please, on page 7, line 24

(Testimony of Leonard R. Tobin.)

to 30, stating in substance that the premium rate was much greater.

The Court: The contract was for insurance at a certain rate, and it was paid for. Now, I am not interested in what the rate would be for, say, 150 miles. As I understand, the only question here is whether or not this truck was used outside of the territory described in the contract.

Mr. Lounibos: Regularly and frequently. [92]

The Court: Yes.

Mr. McKinnon: May I be permitted to make a statement? I do not know whether your Honor will allow me to.

The Court: You may, but usually it is limited to one counsel. If you wish to pursue it you may, but I do not see how it is material.

Mr. McKinnon: We would like to show where that would be very material.

Mr. Lounibos: I just want to ask a few questions more.

Q. Mr. Tobin, suppose this equipment was garaged at Napa, do you know what the rate would be then?

Mr. Morris: I object to that as immaterial.

The Court: Overruled.

A. There would not be any change in the rate, at all.

Mr. Lounibos: Q. If it were garaged, for example, at Santa Rosa.

A. No change at Santa Rosa.

(Testimony of Leonard R. Tobin.)

Q. No change, at all? A. No.

Mr. Lounibos: That is all.

Mr. Brazier: Q. Mr. Tobin, it is true, is it not, that the State is divided into various districts for rate-making purposes? A. Yes.

Q. And that San Francisco Bay Region is one of the high rate areas? A. Yes.

Q. Los Angeles is another high rate area, is that not true? A. Yes.

Q. And there are two or three other high rate areas, are there not? A. That is right.

Q. And then the rest of the State takes what is called the remainder of the State rate, does it not? A. Right.

Q. Now, is it not true that in Marin County the remainder of the [93] State rate prevails?

A. Yes.

Q. And in Sonoma County the remainder of the State rate prevails? A. Yes.

Q. In Mendocino County the same?

A. Yes.

Q. And in Humboldt County the same?

A. Yes.

Q. In other words, in most of the so-called cow or country counties the remainder of the State rate prevails and is the same, isn't that true?

A. That is right.

Q. So that the rate that you would charge for this particular equipment, if it had been used in Mendocino County, would be no greater and

(Testimony of Leonard R. Tobin.)

no less than the rate you charge in Marin County, isn't that true? A. That is true.

Q. Now, if Mr. Tunzi's equipment were rated for use in Mendocino County and garaged at Ukiah, that 100 miles radius would take it into Humboldt County and down into Sonoma County?

A. Yes.

Q. And the rates there would be all the same, would they not? A. That is right.

Q. And the risk of use of the truck in those particular counties would be less than the risk of use in San Francisco County, would it not?

A. That is a hard one to answer.

Q. Your rates are based upon the percentage of risk, are they not? A. That is right.

Q. You have told us that the San Francisco rate, or the rate for San Francisco County and the Bay Region is one of the high rate areas of the State, is it not? A. That is right.

Q. If this truck were to be garaged at Novato and used within 100 miles radius, it could have been used in San Francisco, Oakland, Berkeley, could it not? A. That is right.

Q. It could have been used in a high risk area, could it not? A. That is right. [94]

Q. And in an area where the risk was greater than if used in Mendocino and Humboldt Counties, isn't that true? A. It might be, yes.

Q. What is your answer, "might be," or "Yes"?

A. Well, I guess, yes.

Mr. Brazier: That is all.

(Testimony of Leonard R. Tobin.)

Redirect Examination

Mr. Morris: Q. But the risk is greater where the equipment is used beyond the 100-mile radius?

A. Where it is used beyond 100 miles radius the rate is much higher.

Q. No matter where it is garaged?

A. That is right.

Q. Then the garaging would be the starting point of the rate? A. Yes.

Q. And the rate where it is used beyond 100 miles of the starting point is higher, that is, a \$700 rate beyond the 100 miles, and up to 150 miles? A. That is right.

Q. And when it goes beyond that it is around \$1000, that is, from the point of garaging?

A. Yes.

Q. That is the way the rates are fixed, is it not?

A. That is the way they are fixed.

Mr. Morris: That is all. Plaintiff rests.

JULIUS PETERSEN,

called for the Defendants; Sworn.

Mr. Lounibos: Q. Your name is Julius Petersen? A. Yes.

Q. Where do you reside? A. Novato.

Q. What is your business or occupation?

A. Trucking business.

Q. In July, 1940, were you using any equipment belonging to the defendant F. E. Tunzi?

A. Two trucks and two trailers.

Q. At that time did you place any public lia-

(Testimony of Julius Petersen.)

bility insurance upon [95] those trucks and trailers?

A. I did.

Q. With the plaintiff company? A. Yes.

Q. You have read the complaint in this case?

A. I have.

Q. You have seen the copy of the insurance policy attached? A. Yes.

Q. And that was the insurance policy that was issued upon these trucks and trailers in July, 1940?

A. Yes.

Q. Do you know where the insurance policy was deposited, if anywhere, after it was issued?

A. With the Railroad Commission.

Q. Was Tunzi a public contract hauler?

A. Tunzi was not a public contract hauler.

Q. But you were a public contract hauler?

A. Yes.

Q. Starting with the date of the policy, July 1, 1940, for how long a period thereafter did you continue to use the equipment covered by that policy belonging to the defendant Tunzi?

A. I used both trucks and trailers until in December, there, until the time I discontinued the use of the truck and trailer that is involved in this accident, and I continued using the other Diesel truck and trailer.

Q. Were both trucks and trailers covered by this policy?

A. They were both covered by this policy.

Q. Do you know what the premium was that was paid for that policy?

(Testimony of Julius Petersen.)

A. For the two trucks and trailers around \$390.

Q. And it covered two trucks and two trailers?

A. It covered two trucks and two trailers.

Q. Can you tell us about how many different trips you used the equipment covered by this policy on from July, 1940, up to the day that you turned over this one truck and trailer to the defendant?

Mr. Morris: I object to that as immaterial, and not involved [96] in this case.

Mr. Lounibos: I would like to be heard on that.

The Court: What difference does it make as to how many trips that Petersen made with the trucks?

Mr. Lounibos: Because I think we must measure the language of the policy, frequent and regular use, with reference to the duration of the policy.

The Court: We are not concerned with what he did with it, at all.

Mr. Lounibos: I think we are, your Honor. In other words, it is my idea that the policy was issued on the basis that the vehicles could not be used regularly and frequently beyond the 100 mile limit.

The Court: There is no complaint against Petersen for his use of the truck, as I understand it.

Mr. Lounibos: No. He disclaims all interest.

The Court: I say there is no complaint. It is immaterial how many times he used it. I do not see what difference it makes.

(Testimony of Julius Petersen.)

Mr. Lounibos: Q. How long did you say you had it—from July 1 to December?

A. About, yes.

Q. I suppose you used it continuously in your particular business?

A. I did.

Q. Were you working every day?

A. About every day.

Q. Nearly every day during that time?

A. Yes.

Q. You never took it beyond the 100-mile limit?

A. Never went out of the 100-mile limit.

Mr. Brazier: Might I inquire as to the equipment that is involved in this accident, the truck that you did not use after December, as to how many trips, all told, you made with that equipment?

A. With that equipment? [97]

Q. Yes.

Mr. Morris: I object to that as immaterial.

The Court: I do not see how it is material, Counsel.

Mr. Brazier: If I may be heard——

The Court: You need not argue it. Go ahead and ask the question.

Mr. Brazier: Q. Do you remember the question?

A. You asked me how many times I used that piece of equipment during the time I had it. I used it about every day I had it.

The Court: Q. There might have been some days you did not use it, but almost every day?

A. Almost every day.

(Testimony of Julius Petersen.)

Mr. Brazier: Q. Approximately how many trips would you say you took with it?

A. I might have made 200 trips.

Mr. Brazier: That is all.

The Court: Any cross-examination?

Mr. Morris: No cross-examination.

The Court: The next witness.

Mr. Lounibos: We would like to confer for one minute.

The Court: Yes.

Mr. Lounibos: Mr. Morris, can you stipulate to the fact that there would be considered read into the record the provisions of the State Highway Carrier Act?

Mr. Morris: I do not think that is necessary, your Honor. The Court will take judicial notice of it.

The Court: No, I will take judicial notice of it. I think those sections have already been called to my attention, have they [98] not?

Mr. Lounibos: They have. Would it be stipulated, Mr. Morris, that the policy involved in this litigation was deposited by your client, the Plaintiff, with the Railroad Commission, *under the* pursuant to the terms of the State Highway Carrier Act?

The Court: The face of the policy already introduced in evidence shows it was filed with the Railroad Commission July 12, 1940.

Mr. Lounibos: Would it be stipulated that F. E. Tunzi was operating as a carrier under the High-

way Carrier Act at the time of the issuance of this policy?

Mr. Morris: I will stipulate that he had license plates permitting him to do so. I won't stipulate that he was actually doing it, that he was operating.

Mr. Lounibos: But there were license plates for the operation on the vehicles involved.

Mr. Morris: Yes.

Mr. Brazier: Will you stipulate also that no notice of termination of the policy was ever filed with the Railroad Commission pursuant to the endorsement appearing on the policy?

Mr. Morris: I will stipulate that no notice of termination of the coverage granted by the policy was filed with the Railroad Commission.

Mr. Brazier: Nor any other notice filed with the Railroad Commission?

Mr. Morris: You mean prior to the accident?

Mr. Brazier: Yes.

Mr. Morris: Yes.

The Court: Is that all? [99]

Mr. Lounibos: The defendants rest.

The Court: Is that all, Mr. Morris?

Mr. Morris: That is all.

The Court: Do you wish to argue it?

Mr. Morris: No, I would prefer to submit it on briefs.

(Thereupon the case was submitted on briefs to be filed 10, 10, and 5.) [100]

[Endorsed]: Filed Apr. 25, 1942. [101]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Bankers Indemnity Insurance Company, a corporation, and to Charles B. Morris, Esq. and Carroll B. Crawford, Esq., attorneys for said Plaintiff:

You and each of you will please take notice and you are hereby notified that Eugene J. Westphalen, Charles Zanella and Aetna Casualty and Surety Company, a corporation, defendants in the above entitled action, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the final judgment herein entered on the 4th day of August, 1942, in favor of the said plaintiff and against the said defendants, and from the whole of said judgment.

Dated: September 3, 1942.

ELLIOT JOHNSON

Central Bank Building,
Oakland, California.

ALBERT M. HARDIE

414 13th street, Oakland, California,

Attorneys for Defendants Eugene J. Westphalen and Aetna Casualty and Surety Company, a corporation

TAFT & SPURR

Marks Building, Ukiah, California,

Attorneys for Defendant

Charles Zanella

[Endorsed]: Filed Sept. 3, 1942. [102]

[Title of District Court and Cause.]

DESIGNATION OF RECORD ON APPEAL

To the Clerk of the District Court of the United States for the Northern District of California:

You will please prepare a transcript of the records in the above-entitled action to be used upon appeal in said action, embodying the following:

1. Complaint with exhibits attached;
2. Answer of Defendants Westphalen and Aetna Casualty and Surety Company, a corporation;
3. Temporary Injunction;
4. Answer of Defendant Tunzi;
5. Answer of Defendant Petersen;
6. Answer of Defendant Curry; [103]
- 6½. Stipulation re Answer Westphalen and Aetna Casualty and Surety Company;
7. Answer of Defendant Zanella;

8. Memorandum and Order;
9. Findings of Fact and Conclusions of Law;
10. Judgment and Decree;
11. Notice of Appeal;
12. Designation of Record on Appeal;
13. Points on Appeal;
14. Transcript of Testimony at Trial.

ALBERT M. HARDIE

ELLIOTT JOHNSON

Attorneys for Defendants Eugene J. Westphalen
and Aetna Casualty and Surety Company, a
corporation.

TAFT & SPURR

Attorneys for Appellant

Charles Zanella

[Endorsed]: Filed Sept. 16, 1942. [104]

[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH AP-
PELLANTS INTEND TO URGE UPON
APPEAL IN THE ABOVE ENTITLED
ACTION

Eugene J. Westphalen, Charles Zanella and
Aetna Casualty Company, a corporation, defend-
ants and appellants in the above-entitled action,
hereby present the following points which they in-

tend to urge and rely upon on appeal from the judgment in said action, to-wit:

That the judgment in the above-entitled action is contrary to law in that:

1. Said judgment purports to grant to the plaintiff above named an injunction restraining the defendants above named from taking further proceedings for any judgment or judgments against certain of the defendants for personal injury or property damages by reason of an alleged breach of an automobile liability insurance policy by the defendant Tunzi whereas in truth and in fact the [105] said policy of insurance had never been breached by the defendant Tunzi or by defendant Petersen;

2. Said judgment purports to grant to the plaintiff above named an injunction restraining the defendants above named from taking any further proceedings for any judgment or judgments against certain of the said defendants for personal injury or property damages by reason of an alleged breach by the defendant Fred E. Tunzi of a policy of automobile liability insurance issued by the plaintiff in that the truck and trailer involved in said action had not been principally garaged and used in the town of Novato, California, whereas in truth and in fact said truck and trailer had been principally garaged and used in the said town of Novato, California;

3. Said judgment purports to grant to the plain-

tiff above named an injunction restraining the defendants above named from taking any further proceedings for any judgment or judgments against certain of the said defendants for personal injury or property damages by reason of an alleged breach by the defendant Fred E. Tunzi of a policy of automobile liability insurance issued by the plaintiff in that the truck and trailer involved in said action had been rented or leased by the defendant Tunzi whereas in truth and in fact said truck and trailer had never been rented or leased by the defendant Tunzi or by defendant Petersen;

4. Said judgment purports to grant to the plaintiff above named an injunction restraining the defendants above named from taking any further proceedings for any judgment or judgments against certain of the said defendants for personal injury or property damages by reason of an alleged breach by the defendant Fred E. Tunzi of a policy of automobile liability insurance issued by the plaintiff in that the regular and frequent use of the truck and trailer involved in said action had not been confined to the territory within 100 miles of Novato, California, whereas in truth [106] and in fact the regular and frequent use of the said truck and trailer had been confined to the territory within 100 miles of said Novato, California;

5. Said judgment purports to grant to the plaintiff above named an injunction restraining the defendants from taking any further proceedings for

any judgment or judgments against certain of said defendants for personal injury or property damages for the reason that the truck and trailer involved in said action were not covered by the above mentioned policy of automobile liability insurance at the time of the accident mentioned in the complaint, whereas in truth and in fact the said truck and trailer were covered by said policy of automobile liability insurance at the time of the accident in question;

6. Said judgment purports to grant to the plaintiff above named an injunction restraining the defendants from taking any further proceedings for any judgment or judgments against certain of the defendants for personal injury or property damages for the reason that the plaintiff was under no liability to these defendants under its policy of automobile liability insurance whereas in truth and in fact the said plaintiff was liable to these defendants under and by virtue of the said policy of automobile liability insurance;

Said judgment purports to grant to the plaintiff above named an injunction restraining the defendants from taking any further proceedings for any judgment or judgments against certain of the said defendants for personal injury or property damages, notwithstanding the fact, as found by the said Court, that no notice of the cancellation of the said policy of automobile liability insurance

was ever given to the Railroad Commission of the State of California as required by law.

ALBERT M. HARDIE

ELLIOTT JOHNSON

Attorneys for Defendants Eugene J. Westphalen
and Aetna Casualty and Surety Company

TAFT & SPURR

Attorneys for Defendant

Charles Zanella

[Endorsed]: Filed Sep. 16, 1942. [107]

District Court of the United States
Northern District of California

**CERTIFICATE OF CLERK TO TRANSCRIPT
OF RECORD ON APPEAL**

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 107 pages, numbered from 1 to 107, inclusive, contain a full, true, and correct transcript of the records and proceedings in the case of Bankers Indemnity Insurance Company, a Corp., Plaintiff, vs. Eugene J. Westphalen, et al., Defendants. No. 21865-S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Nine-dollars and five-cents

(\$9.05) and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 12th day of October A. D. 1942.

[Seal]

WALTER B. MALING

Clerk

WM. J. CROSBY

Deputy Clerk

[Endorsed]: No. 10286. United States Circuit Court of Appeals for the Ninth Circuit. Eugene J. Westphalen, Charles Zanella and Aetna Casualty and Surety Company, a corporation, Appellants, vs. Bankers Indemnity Company, a corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed October 13, 1942.

PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit
No. 10286

EUGENE J. WESTPHALEN, AETNA CAS-
UALTY AND SURETY COMPANY, a cor-
poration, and CHARLES ZANELLA,
Appellants,

vs.

BANKERS INDEMNITY INSURANCE COM-
PANY, a corporation,
Appellee.

STATEMENT OF POINTS AND DESIGNA-
TION OF RECORD ON APPEAL IN
ABOVE COURT

The appellants above named hereby adopt the statement of points and the designation of parts of record to be printed filed in the District Court and contained in the Clerk's certified transcript of record as a compliance with Subdivision 6 of Rule 19 of the Rules of Practice of the Circuit Court of Appeals.

Dated: October 13, 1942.

ALBERT M. HARDIE
ELLIOTT JOHNSON

Attorneys for Appellants Eugene J. Westphalen
and Aetna Casualty and Surety Company, a
corporation.

TAFT & SPURR

Attorneys for Appellant
Charles Zanella

[Endorsed]: Filed Oct. 15, 1942.

[Title of Circuit Court of Appeals and Cause.]

APPELLANTS' AMENDED DESIGNATION
OF RECORD ON APPEAL

Appellants having first obtained leave of the Court, file this their amended designation of record pursuant to Rule 19, Subdivision 6, of the Rules of Practice of the above-entitled Court and state that the record necessary for consideration on appeal is the entire record on appeal as certified and transmitted by the Clerk of the District Court of the United States for the Northern District of California to the Clerk of the above-entitled Court, with the exception of Part One of Exhibit A attached to the complaint of the appellee filed in said District Court, commencing with the words "Part 1, The Columbia Fire Insurance Company" on page 1 of said exhibit (on page 15, Certified Transcript) all of page 2, said exhibit (page 16 Transcript) to and including the signature of Paul B. Simmons and the word "President" on page 3, exhibit (on page 17 Transcript).

Dated: October 22, 1942.

Receipt of a copy of within amended designation of record on appeal is hereby admitted this October 22, 1942.

ALBERT M. HARDIE

ELLIOTT JOHNSON

Attorneys for Appellants Eugene J. Westphalen

and Aetna Casualty and Surety Company, a corporation.

TAFT & SPURR

Attorneys for Appellant

Charles Zanella

CHARLES B. MORRIS

CARROLL B. CRAWFORD

Attorneys for Appellee

[Endorsed]: Filed Oct. 22, 1942.

No. 10,286

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IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EUGENE J. WESTPHALEN, CHARLES ZANELLA,
and AETNA CASUALTY AND SURETY COM-
PANY (a corporation),

Appellants,

VS.

BANKERS INDEMNITY INSURANCE COMPANY
(a corporation),

Appellee.

APPELLANTS' OPENING BRIEF.

ALBERT M. HARDIE,

414 13th Street, Oakland, California,

Attorney for Appellants,

*Eugene J. Westphalen and Aetna Casualty
and Surety Company (a corporation).*

FRANK W. TAFT,

Marks Building, Ukiah, California,

Attorney for Appellant,

Charles Zanella.

FILED

JAN 15 1943

PAUL P. O'BRIEN,
CLERK

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No. 10,286

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EUGENE J. WESTPHALEN, CHARLES ZANELLA,
and AETNA CASUALTY AND SURETY COM-
PANY (a corporation),

Appellants,

vs.

BANKERS INDEMNITY INSURANCE COMPANY
(a corporation),

Appellee.

APPELLANTS' OPENING BRIEF.

STATEMENT OF THE CASE.

NATURE OF ACTION AND JURISDICTIONAL STATEMENT.

This appeal is from a judgment in an action brought by the Appellee in the United States District Court for the Northern District of California under the Federal Declaratory Judgment Act. (Judicial Code, Section 274d, 28 U.S.C.A., Section 400.) (Tr. p. 2.) The record discloses a diversity of citizenship between the Appellee and the defendants and that the amount in controversy, exclusive of interest and costs, exceeded the sum of three thousand dollars. (Tr. p. 3.) (Par. 1, Sec. 41, Title 28 U.S.C.A.) The judgment decreed that Appellee was and is not

liable to Appellants and the other defendants under an automobile liability insurance policy issued by it to the defendants Fred E. Tunzi and Julius Peterson and made permanent a preliminary injunction restraining Appellants from proceeding to judgment actions brought in the State Court for the purpose of imposing liability on the Appellee by virtue of the policy of automobile liability insurance above mentioned, based upon personal injuries and property damages caused by the negligent operation of a truck and trailer covered by the policy. This Court has jurisdiction of this appeal under Par. (a), Sec. 225, Title 28 U.S.C.A., by virtue of notice of appeal and bond filed September 3, 1942.

FACTS INVOLVED IN CONTROVERSY.

The facts out of which the controversy arose are that on July 11, 1940, Appellee issued to defendant Tunzi a policy of automobile liability insurance covering two trucks and trailers then in the possession and being operated by the defendant Peterson, one of which two trucks and trailers was involved in the accident out of which the claims of Appellants arise. The term of the policy was for one year, July 1, 1940, to July 1, 1941, and provided for the payment by Appellee on behalf of the assured of damages for personal injuries to one person in a sum not exceeding \$10,000 and not exceeding \$20,000 for two or more persons in one accident and property damages not exceeding \$5000 in one accident. The policy

was on July 12, 1940, deposited with the Railroad Commission of California, and thereafter on January 2, 1941, the name of the defendant Julius Peterson was added to the policy by endorsement as an assured with that of the defendant Tunzi. This endorsement was likewise filed with the Railroad Commission.

In issuing its policy the Appellee attempted to limit its liability thereunder by two declarations or warranties and an exclusion clause, as follows:

On the face of the policy in Section 4, there appears the following:

"The following items are declared by the insured to be true: * * * (e) The Automobile will be principally garaged and used in the above town, county and state, Novato, California, unless otherwise specified herein." (Tr. pp. 15-16.)

By a "Description of Use Endorsement" attached to the policy, it is provided:

"In consideration of the premium at which the policy designated above is issued, it is warranted by the Insured that

Warranty No. 1

Subject to the territorial limitations of such policy the regular and frequent use of the commercial type vehicle(s) described in such policy is and will be confined to the territory within 100 miles of Novato." (Tr. pp. 22-23.)

The exclusion clause reads as follows:

"This policy does not apply * * * (referring to the truck) while rented under contract or

leased, unless such use is specifically declared and described in this policy and premium charged therefor." (Tr. p. 28.)

There is also attached to and made a part of the policy a "Termination of Coverage Endorsement" which reads as follows:

"It is agreed that such Public Liability (Bodily Injury Liability) and Property Damage Liability as is afforded by the policy of which this endorsement is a part shall not terminate or become void for any reason whatsoever, except by the annual expiration of said policy, any statement in the policy or in any endorsement issued in connection therewith to the contrary notwithstanding, until after ten days' notice thereof in writing shall have been given by the insurer to the Railroad Commission of the State of California at its office in the State Building, San Francisco, California, said period of ten days to commence to run from the date said notice is actually received at said office of the Commission.

It is further agreed that if any policy of which this endorsement forms a part shall be cancelled or otherwise terminated and shall thereafter be reinstated at any time, notice in writing of such reinstatement shall be given by the insurer at the time of issuance thereof to said Railroad Commission at its said office.

It is further agreed by the insurer that the insured is engaged in the business of transporting property for compensation or hire over the public highways in the State of California.

It is further agreed that it is not the intention of this endorsement to alter the exclusions of the policy of which it forms a part." (Tr. pp. 17-18.)

On January 14, 1941, Appellant Eugene J. Westphalen suffered personal injuries and property damage and Appellant Charles Zanella suffered personal injuries in a collision between an automobile driven by Westphalen and one of the trucks with trailer attached which was covered by the policy, through alleged negligence of defendant Denman R. Curry, the operator of the truck. (Tr. p. 64.) The Appellant Aetna Casualty Company is a subrogee as to certain rights of the Appellant Westphalen. (Tr. p. 66.)

The policy was issued pursuant to the requirements of the Highway Carriers' Act of California, enacted in 1935 (1935 Stat. 878), and amended in 1937 (1937 Stat. 2006, Deering's Genl. Laws, Act 5129a), the pertinent parts of which are as follows:

"Sec. 5. Protection Against Liability Required. The Railroad Commission shall in granting permits under the provisions of this act, require the highway carrier to procure and continue in effect during the life of the permit, adequate protection, as required in section 6 hereof, against liability imposed by law upon such highway carrier for the payment of damages for personal bodily injuries (including death resulting therefrom) in the amount of not less than five thousand dollars on account of bodily injuries to, or death of, one person; and protection against a total liability of such highway carrier on account of bodily injuries to, or

death of, more than one person, as the result of any one accident, in the amount of not less than ten thousand dollars; and protection in an amount of not less than five thousand dollars for one accident resulting in damage or destruction of property, whether the property of one, or more than one claimant.

Sec. 6. Alternative Methods of Protection. The protection required under section 5 shall be evidenced by the deposit with the Railroad Commission, covering each vehicle used or to be used under the permit applied for, of a policy of public liability and property damage insurance, issued by a company licensed to write such insurance in the State of California; or of a bond of a surety company licensed to write surety bonds in the State of California; or of a personal bond, with such sureties as the Railroad Commission shall find adequate to guarantee the protection prescribed in section 5 hereof; or it shall be evidenced by a trust fund in the amount of fifteen thousand dollars, to be held in trust by some institution or person acceptable to the Railroad Commission; or by a combination of any or all of said methods in such manner that the aggregate of the protection or funds available therefor shall equal the principal sum of not less than fifteen thousand dollars, and such highway carrier shall have the option of the method to be used in obtaining such protection, and may change from one method to another from time to time, with the consent of the Railroad Commission. With the consent of the Railroad Commission a copy of an insurance policy, duly certified by the company issuing it to be a true copy of the original policy, or a photostatic copy thereof,

or an abstract of the provisions of said policy, or a certificate of insurance issued by the company issuing such a policy, may be filed with the Railroad Commission in lieu of the original or a duplicate or a counterpart of said policy.

Sec. 7. Duration of Protection: Regulations. The protection against liability as outlined in Section 5 hereof must be continued in effect during the active life of the permit, and the policy of insurance, surety bond or personal bond shall be not cancellable on less than ten (10) days written notice to the Railroad Commission. The Railroad Commission shall have power to establish such rules and regulations as may be necessary to carry out the provisions of Sections 5 to 7, inclusive."

The Appellee alleged in its complaint or petition that "said policy has been in effect from July 1, 1940, to the date of the accident" (Tr. p. 4) and in its findings the Court found such to be the fact. (Tr. p. 61.) It was a stipulated fact at the trial that no notice under the Termination of Coverage Endorsement was filed with the Railroad Commission prior to January 14, 1941, the date of the accident involved in the controversy. Also, no notice of cancellation was ever given by the insurance company to the assured. (Tr. pp. 88, 129.) It is undisputed that the assured was engaged in the business of transporting property for compensation or hire over and upon the public highways of California.

ARGUMENT.**THE JUDGMENT IS AGAINST LAW.**

The learned trial judge in his memorandum and order concluded that the truck and trailer were "rented under contract or leased" at the time of the accident and were therefore not covered by the policy and that the Appellee was not liable to any of the defendants under the policy of insurance. (Tr. p. 58.)

The judgment is against law in that the trial Court erred in its conclusion that the truck and trailer were not covered by the policy and in making permanent the preliminary injunction theretofore issued, thereby releasing Appellee from its liability to Appellants thereunder.

SUMMARY OF APPELLANTS' CONTENTIONS.

To summarize Appellants' position we submit:

(a) That the policy of automobile liability insurance involved in this appeal is a statutory or compulsory policy as distinguished from a voluntary policy;

(b) The policy having been issued under and because of the requirements of the Highway Carriers' Act of California, as a means of protection to the public should be most favorably construed to effectuate the objects and purposes of the regulatory statute;

(c) The provisions of the Termination of Coverage Endorsement providing that the policy should not terminate or become void for any reason during its term until after the prescribed 10 days' notice was

given to the Railroad Commission, nullified the two warranties relied upon by Appellee to escape liability under its policy;

(d) The policy was on the date that Appellants' cause of action arose against the assured in full force and effect and could only have been cancelled by the giving of the 10 days' notice to the Railroad Commission as provided in the Highway Carriers' Act;

(e) The limitations in the policy or in endorsements thereon and forming a part thereof attempting to limit the liability of Appellee to Appellants are contrary to the express purpose and object of the statute requiring the issuance of the policy and are therefore void as against public policy and invalid insofar as such limitations affect the rights of Appellants under the policy, Appellants being injured third persons; and

(f) No breach of the terms of a compulsory or statutory policy by the assured can affect the right of an injured third party to recover under the policy.

CONSTRUCTION OF POLICY.

(Summary a and b.)

The requirement of securing sufficient insurance prior to receiving authority to do business in a state is considered compulsory and not voluntary.

Worrell v. Worrell (1939), 174 Va. 11, 4 S. E. (2d) 343.

The statute being one primarily for the benefit of the public, both the statute and policies issued under

and because of its requirements, should be most favorably construed to favor the public and strictly against the insurer to give the maximum protection obtainable.

Bleimeyer v. Public Service Mut. Cas. Ins. Corp., 250 N. Y. 264, 165 N. E. 286.

The purpose of the regulatory statute is to protect the public against reckless operation of such vehicles by financially irresponsible owners, and to provide a means of recovery for those injured in their person or property by such operation.

Sills v. Schneider (1939), 197 Wash. 659, 86 Pac. (2d) 203;

Hindel v. State Farm Mut. Auto Ins. Co. of Bloomington, Ill. (C.C.A.), 97 Fed. (2d) 777;

Travelers Mut. Casualty Co. v. Herman (C.C. A.), 116 Fed. (2d) 151.

Furthermore, it has been held that the obligations of such a policy as the one under consideration here are measured and defined by the pertinent statute and the two together form the insurance contract, and that such statute must be construed in its entirety and in view of the purpose of the legislature to furnish uniform protection.

Schulte v. Great Lakes Forwarding Corp. (1940), 288 Iowa 1012, 291 N. W. 158;

Commercial Standard Ins. Co. of Fort Worth v. Foster (D.C., 1940; affirmed C.C.A.), 121 Fed. (2d) 117;

Hipp v. Prudential Cas. & Surety Co. of St. Louis, 346 S. D. 300, 244 N. W. 346.

UNDER THE PROVISIONS OF THE TERMINATION OF COVERAGE ENDORSEMENT APPELLEE IS LIABLE ON ITS POLICY REGARDLESS OF VIOLATIONS OF WARRANTIES BY ITS ASSURED.

(Summary c and d.)

We invite the attention of the Court to the Termination of Coverage clause which was made a part of the policy by way of endorsement. This endorsement was obviously required by the Railroad Commission of California because of the requirements of the Highway Carriers' Act in order that the assured might qualify for the issuance of the necessary permit to conduct their operations as highway carriers. It was specifically provided in this endorsement that such Public Liability (Bodily Injury Liability) and Property Damage Liability as is afforded by the policy *should not terminate or become void for any reason whatsoever* except by the annual expiration of the policy, *any statement in the policy or in any endorsement issued in connection therewith to the contrary notwithstanding*, until after ten days' notice thereof in writing was given to the Railroad Commission by the insurer. (Tr. pp. 17-18.)

It is undisputed that the policy was effective on the date of the accident and that no notice of its cancellation was given as provided in the statute or otherwise. The coverage originally afforded by the policy specifies Bodily Injury Liability and Property Damage Liability to persons for personal injuries or Property Damage occasioned by the operations of the insured upon the highways. (See Part 2 Coverages A and B of Policy, Tr. p. 22.) This coverage was afforded at all times after July 1, 1940, including the date of

the accident, because the endorsement specifically provided that such liability as was afforded by the policy should not *terminate or become void for any reason whatsoever*, except by the annual expiration of the policy, any statement therein or in any endorsement forming a part thereof to the contrary notwithstanding until after the ten days' notice in writing given to the Railroad Commission, which in this case was never given. We respectfully submit that this provision of the Termination of Coverage Endorsement which without doubt was required by the Railroad Commission under the express provisions of the Highway Carriers' Act, is completely at variance with the two warranties above referred to and had the effect of nullifying and rendering them unavailable as a defense to Appellee in this action.

**THE EXCLUSION CLAUSE IN THE POLICY AGAINST RENTING
IS VOID AS TO APPELLANTS ON THE GROUND OF PUBLIC
POLICY.**

(Summary e.)

This clause is void as to appellants upon the ground of public policy as a violation of the expressed purpose of the California Highway Carriers' Act. It is neither necessary to indulge in speculation nor resort to conjecture to ascertain and determine the intent and purpose of the legislature of California when it enacted the Highway Carriers' Act. In specifying in the law, as it did, that highway carriers be required to provide and to continue in effect during the life of the permit, *adequate protection* by the procuring of

liability insurance policies which could only be cancelled during the term for which they were issued by and through a prescribed method of giving notice to the Railroad Commission, the legislature intended to provide a system of protection for the public generally and in particular those of its members who would be so unfortunate as to receive injuries to their person or property through the carelessness or negligence of highway carriers. In employing the phrase "*adequate protection*" the legislature intended to mean and could only mean just exactly what the words imply, *namely*, not only protection but, further, that such protection be ample and sufficient. For the definition of the word "*adequate*" we are informed by Webster's Dictionary that the meaning is "*equal to requirement*", "*sufficient*", "*competent*", "*suitable*". Can it be said with any degree of accuracy or truthfulness that the protection in the instant case was adequate, if Appellee can evade its liability to Appellants through any violations by its assured of any such limitations as is relied upon by Appellee? We think not.

If insurance carriers be permitted to avoid liability to injured third persons through the claims of violations by their insured of such limitation clauses as we are here confronted with, then the whole purpose of the statute is frustrated and no protection is afforded to the public for the very obvious reason that just when the public risk becomes the greatest and this protection is most required, the protection ceases to exist. We are not here concerned with the question as to how the limitations on liability might affect rights

or claims of the insured for indemnity but if such rights of the public be jeopardized or eliminated, the protection designed and intended by the makers of the law is rendered far from *adequate*. As was said by the Court in the case of

Consolidated Shippers v. Pacific Employers Ins. Co., 45 Cal. App. (2d) 288 at page 293 (114 Pac. (2d) 34):

“As between themselves the parties were entirely competent to limit the liability in any manner they saw fit, although under the law such limitation would be invalid as to an injured claimant under the policy.”

The opinion from which the above is a quotation concerned two policies of liability insurance issued under the provisions of the Federal Motor Carrier Act of 1935 (49 U.S.C.A., Sec. 315) (see Appendix) which so far as its purpose to afford protection to the public is concerned is no more specific or of greater scope than is the California Highway 'Carriers' Act, and under the broad principle of public policy any such limitation in its liability to Appellants as is contended by Appellee by reason of this exclusion clause would be invalid and of no effect whatsoever.

The finding of the Court was that the truck and trailer were by the defendant Tunzi “hired, rented under contract, or leased” to the defendant Denman R. Curry (Tr. p. 67) and is based upon testimony which revealed very indefinite dealings between these defendants with respect to the operation of the vehicle. (Testimony of Tunzi, Tr. pp. 79, 80, 81, 82.) Con-

ceding for the purpose of this argument that such negotiations as were had between Tunzi and Curry constituted a lease of the truck and trailer by the former to the latter, the relationship of lessor and lessee if it did exist did not release Appellee of its liability to Appellants under its policy for the reason that any contract contrary to the spirit or purpose of the regulatory act would as to Appellants be void as against the policy of the law. As an authority for this proposition we cite the case of

McDonald v. Lawrence, 100 Wash. 215, 170 Pac. 576 at 577,

wherein the Supreme Court of the State of Washington in construing rights under a very similar situation to that which existed in the present action with respect to the use of an automobile, said in part:

“It is the claim of appellants that this evidence shows a bailment or lease of the automobile by Lawrence to Krueger, whereby the appellants would be exonerated from any liability for the negligence of Krueger, and that the Court should have directed a verdict in favor of appellants. We think this testimony of the witness Krueger is susceptible of either one or two constructions, namely, that he was the lessee of appellant Lawrence, or that he was an employee. This would naturally present a question for the jury, and the inference from the evidence adopted by them would be controlling. * * * But should we agree with appellants that the evidence under discussion presented a question of law for the court in that it clearly showed a letting rather than an employment, *we would be compelled to hold*

against appellants on the ground of public policy. The legislature has unmistakably announced the policy of the state as to the manner in which the carriage of passengers for hire by motor vehicles in cities of the first class is to be regulated, and any contract entered into which would be evasive of the dominant purpose of the act would be void. For that reason the contract between Lawrence and Krueger could not be construed otherwise than as a contract of employment. And, indeed, since such an inference can be readily drawn from the evidence, it ought to be so construed, in view of the fact that no other relation would be justified under the purpose of the regulative statute."

We submit that the sound reasoning announced by the Supreme Court of Washington applies with equal vigor to the case under consideration and the conclusion there reached by the Court that to hold such arrangements as were had between the defendants Tunzi and Curry as constituting anything but the relationship of employer and employee would at least so far as Appellants are concerned destroy and entirely defeat the objects and purposes of the Highway Carriers' Act. Hence, if the very indefinite negotiations between these defendants, Tunzi and Curry, constituted the relationship of lessor and lessee, such negotiations or contract, were void as to Appellants herein as against public policy and the contract of renting being void, the exclusion clause against renting in the policy would necessarily come under the same category and thereby be rendered unavailable as a defense

to Appellee so far as the rights of Appellants are concerned.

What we have here said with reference to the invalidity of the exclusion clause applies also to the two warranties heretofore discussed.

NO BREACH OF THE TERMS OF A COMPULSORY POLICY BY ASSURED CAN PREJUDICE THE RIGHTS OF INJURED THIRD PERSONS TO RECOVER UNDER THE POLICY.

(Summary f.)

The general rule that defenses available to insurance carriers by reason of acts or omissions on the part of their insured in actions on purely voluntary policies has no application in actions involving rights of injured third persons under compulsory or statutory policies such as is under consideration in this appeal has found expression by the Supreme Court of California in the case of

Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 7 Pac. (2d) 999.

This was an action brought against the insurer which defended on the ground of want of cooperation by the assured. The Court held that such a defense is good except in those cases where the statute required the insurance to be carried, and at page 751 the Court said:

“It is not a compulsory insurance law, requiring every automobile owner or those in a particular class to secure insurance for the protection of the public generally. This latter type of statute, frequently found in the regulation of taxicabs and

other carriers for hire, has usually been given a construction consonant with its purpose, as a result of which the injured party is permitted to recover against the insurance company *regardless of the acts of the assured*. (See *Kruger v. California Highway Indemnity Exchange*, 201 Cal. 672, 258 Pac. 602)", and other cases there cited.

In

Kruger v. California Highway Indemnity Exchange, supra.

plaintiff had been injured by a collision with a jitney bus. The jitney bus driver was required by a San Francisco ordinance to provide and carry the type of insurance involved in this appeal. The defendant insurance company attempted to set up as a defense breach of the terms of the policy by the assured in that he did not give the proper notice to the insurance company of service on him of summons. At page 680 of the opinion the Court stated in part:

"This failure on the part of Delaney to forward to appellant the papers served upon him would undoubtedly be a good defense to an action brought upon the judgment by Delaney against appellant, but it is without effect in the present action brought by respondent. Appellant's undertaking to pay the judgment to plaintiff is absolute and is not conditioned upon Delaney's agreement to forward to appellant said papers or any papers which may be served upon him. *The latter's failure to perform his part of the agreement cannot in any way affect appellant's liability to third persons expressly and unconditionally assumed by the terms of the policy.*"

Appellants therefore respectfully submit that regardless of the breach of any declarations or warranties contained either in the policy or in endorsements forming a part thereof, by the defendants Tunzi, Peterson or Curry, which Appellee might assert in actions brought by them upon the policy, such defenses are not available to Appellee as to any member of the general public irrespective whether the acts or omissions of the assured complained of were committed prior or subsequent to the date of the accident. This principle of law applied because of the express statutory requirement that the public be *adequately protected* against injury to person or property by reason of the negligent operation of motor vehicles operated for the transportation of persons or property for hire over the highways of California but does not apply in actions involving voluntary policies. Nor is this requirement of the statute in any way affected or to any degree diminished or altered by the omission in the act itself or in any regulations promulgated thereunder giving to Appellants a primary right of action against Appellee on the policy without first having established their claims against assured. The purpose and object of the statute being without question the means of providing protection to the public, no act or omission on the part of the assured violative of any clause in the policy, whether prior or subsequent to the inception of the cause of action can affect the right of injured third persons to recover upon the policy.

CONCLUSION.

It is respectfully submitted that the judgment of the District Court should be reversed.

Dated, Oakland, California,
January 15, 1943.

ALBERT M. HARDIE,
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Eugene J. Westphalen and Aetna Casualty
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FRANK W. TAFT,
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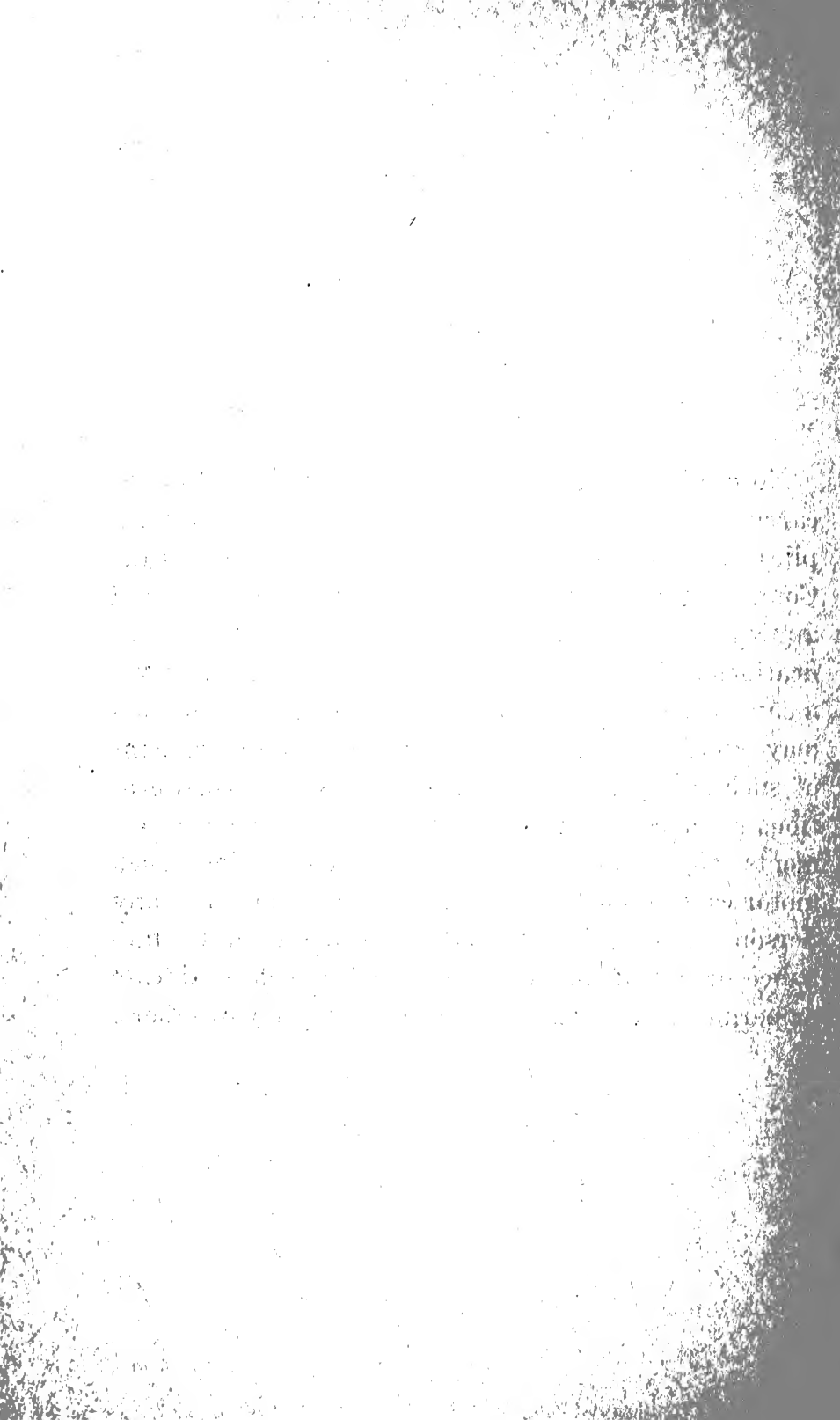
(Appendix Follows.)

Appendix.

Appendix

PORTION OF FEDERAL MOTOR CARRIER ACT REFERRED TO IN ARGUMENT.

No certificate or permit shall be issued to a motor carrier or remain in force unless such carrier complies with such reasonable rules and regulations as the Commission shall prescribe governing the filing and approval of surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements in such reasonable amount as the Commission may require conditioned to pay within the amount of such surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements any final judgment recovered against such motor carrier for bodily injury to or the death of any person resulting from the negligent operation, maintenance or use of motor vehicles under such certificate or permit, or for loss or damage to property of others.



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No. 10,286

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

EUGENE J. WESTPHALEN, CHARLES ZANELLA,
and AETNA CASUALTY AND SURETY COM-
PANY (a corporation),

Appellants,

vs.

BANKERS INDEMNITY INSURANCE COMPANY
(a corporation),

Appellee.

BRIEF FOR APPELLEE.

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FILED

MAR 2 - 1943

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IN THE

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PANY (a corporation),

Appellants,

vs.

BANKERS INDEMNITY INSURANCE COMPANY
(a corporation),

Appellee.

BRIEF FOR APPELLEE.

STATEMENT AS TO JURISDICTION.

This action for declaratory relief was commenced by this appellee in the District Court of the United States for the Northern District of California, Southern Division.

Section 274d of the Federal Judicial Code provides, in part, as follows:

“(1) In cases of actual controversy except with respect to Federal taxes the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate

pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such."

Paragraph III of the complaint (R. 3) sets forth that the amount in controversy herein, exclusive of interest and costs, exceeds the sum of three thousand dollars (\$3000). Paragraph IV alleges that this suit is brought under and pursuant to the Federal Declaratory Judgment Act. (Judicial Code, Section 274d, 28 U. S. C. A., Section 400.) Paragraph X (R. 8) alleges that an actual controversy exists and sets forth at length the nature of said controversy.

This Court has jurisdiction of the appeal under Section 225, Subdivision (a), Title 28, U. S. C. A., and the Notice of Appeal filed September 3, 1942. (R. 130.)

STATEMENT OF THE CASE.

Appellants' Statement of the Case, printed on pages 1 and 2 of their brief, is correct. The matter captioned "Facts Involved in Controversy", beginning on page 2 and ending on page 7, is in effect a continuation of the Statement of the Case. This continuation, with one important exception, is correct, but, to appellee, appears to be unduly curtailed and will be supplemented accordingly. The exception noted by appellee above appears in the last sentence on page 7 of appellants' brief:

“It is undisputed that the assured was engaged in the business of transporting property for compensation or hire over and upon the public highways of California.”

The foregoing statement is contrary to the fact and contrary to the testimony given at the trial, for the record shows without contradiction that about January 1, 1941, defendant Denman R. Curry abandoned his efforts to carry on the business of a public carrier and turned to trading and merchandising, namely, the buying of grape stakes in the redwood country of northern Mendocino and southern Humboldt counties and the selling of these stakes to vineyardists in the vicinity of Napa. By the testimony of defendants Tunzi and Curry themselves it was conclusively established that Curry ceased operating as a public carrier two weeks before the accident, that is, about January 1, 1941. (R. 83-88.) See also R. 108-111, particularly page 111, where Curry describes his method of buying and selling, closing with the statement:

“I would get orders for these grape stakes, and I would go up and buy them and haul them down, and after I would deliver them they would pay me for them.” (R. 111.)

Furthermore, the record shows that appellee's counsel when requested, refused to stipulate as to the operation of truck and trailer in public carrier service. At the trial Mr. Lounibos, attorney for defendant Frank E. Tunzi, said to appellee's counsel:

“Mr. Lounibos. Would it be stipulated that F. E. Tunzi was operating as a carrier under the

Highway Carrier Act at the time of the issuance of this policy?

Mr. Morris. I will stipulate that he had license plates permitting him to do so. I won't stipulate that he was actually doing it, that he was operating." (R. 128-129.)

Additional facts involved in controversy.

The liability policy in question was issued at a reduced premium in consideration of the regular and frequent use of truck and trailer being confined to territory within 100 miles of Novato, California. (R. 15.) The assured also warranted that the two insured vehicles would be principally garaged and used in Novato. (R. 23.) At the trial defendant Curry testified that he took possession of truck and trailer about December 8th or 10th, 1940 (R. 99), and that they were never thereafter garaged at Novato. In fact, except for four or five days when the vehicles were in a repair shop at Napa, they were not garaged at all. Curry testified that he had his bed and camp stuff with him and slept alongside the truck or trailer. (R. 109.) As to use outside the 100 mile radius of Novato, two trips were made by Curry to San Diego during December, 1940. (R. 97.) San Diego is more than 500 miles from Novato, therefore he ran up a mileage of more than 2000. The time required to make these two trips is not shown in the record, but as Curry did public hauling only about three weeks (from December 8th or 10th to Christmas) these two trips must have consumed a good part of the time he was employed doing public hauling. Curry

made one trip to Redwood City from Napa (R. 97) and one to Bodega Bay. (R. 116.) The period from January 1, 1941, to January 14, 1941, was devoted by Curry to his grape stake venture. During this period he was more than 100 miles from Novato much of the time. The accident in question happened about 4½ miles north of Willits at about 12:30 A. M. while Curry was returning southward. Curry was beyond the 100 mile radius from Novato at the time.

At the trial Leonard R. Tobin, underwriter for the general agency which wrote the policy involved herein, testified that he had quoted the rates therefor. For all the equipment insured the premium for use within 100 miles of Novato was \$387 annually; up to and including a 150 mile radius the premium would be around \$700. Beyond the 150 mile radius the premium would be around \$1000. (R. 117-118.)

SUMMARY OF ARGUMENT.

1. Appellants' contention that, as a universal rule of law, no breach of the terms of a statutory liability policy can affect the right of an injured third party to recover thereunder cannot be sustained, for no such rule exists.

2. Neither the California authorities nor those from other states cited and depended upon by appellants are in point herein or decisive of any question involved in this appeal.

3. An examination of California public automobile liability insurance law discloses no reason why the judgment herein should not be affirmed.

4. In California the correct rule for construing statutory public liability policies is that the policy and statute commanding it should be read together as one instrument; when so read herein no error in the trial Court's decision appears.

5. Appellants' interpretation of the "Termination of Coverage Endorsement" is not in accordance with the language thereof.

6. Conclusion.

ARGUMENT.

I.

APPELLANTS' CONTENTION THAT, AS A UNIVERSAL RULE OF LAW, NO BREACH OF THE TERMS OF A STATUTORY LIABILITY POLICY CAN AFFECT THE RIGHT OF AN INJURED THIRD PARTY TO RECOVER THEREUNDER CANNOT BE SUSTAINED, FOR NO SUCH RULE EXISTS.

Because of the breach of warranties as to garaging and use and the violation of the exclusion clause as to hiring, the trial Court found that the truck and trailer were not covered by the policy at the time of the accident. Appellants base their argument for reversal of the judgment upon a supposed general or universal rule of law, which, reduced to its lowest terms in words, they state on page 9 of their brief as follows:

“(f) No breach of the terms of a compulsory or statutory policy by the assured can affect the

right of an injured third party to recover under the policy.”

It will be noticed that the statute or opinion, if any, from which these words are taken is not named by appellants.

Appellee knows of no authority which declares or supports such a general rule. In several states, of which California is not one, the statutes compelling public carrier insurance provide that the insurer's liability shall, with minor exceptions, be absolute as to third parties negligently injured or damaged by a public carrier. But these statutes require liability policies extending coverage *only when the insured vehicle is being used for the transportation of freight or passengers for hire*. They would not be applicable to vehicles which have been withdrawn from public carrier use and are being driven in furtherance of a business or calling for which a public carrier's permit is not required by law, such, for instance, as the grape stake business of appellant Denman R. Curry. (*Foster v. Commercial Standard Ins. Co.*, 121 Fed. (2d) 117, *infra*.) The *Foster* case also refutes the existence of the rule contended for by appellants—that the rights of an injured third party are absolute as against the carrier's insurer—as will be seen from the following summary and quotations from the opinion therein:

In *Foster v. Commercial Standard Ins. Co.*, *supra* (cited on page 10 of Appellants' Opening Brief), the appellant Foster was a public carrier and in that business operated several trucks under a permit issued

to him by the Kansas Corporation Commission. These trucks were insured by appellee Commercial Standard Ins. Co. of Fort Worth. The policy contained a provision required by Rule 24 of the Commission reading:

“Nothing contained in the policy or any endorsement thereon, nor the violation of any of the provisions thereof by the assured, shall relieve the company from liability thereunder.”

As remarked in the opinion in the *Foster* case, “the effect of Rule 24 was to make the statutory liability of the insurer the coverage of the policy, irrespective of any restrictions written into the policy”. As to the provisions of the policy itself, Statement No. 5 of the policy read:

“The automobiles or vehicles described are and will be used only for the transportation of merchandise purposes and will be operated as follows: Principally over the route authorized by the Kansas Corporation Commission and including the State of Oklahoma, and this insurance covers for no other use or operation.”

On a Sunday evening, at a time when the truck was not being used in connection with Foster's business as a contract carrier, he drove several of his family, including his mother-in-law, to the latter's home several blocks away, and parked his truck in front of her house. While it was so parked, a car driven by one Donahue ran into the rear end of the truck, injuring Donahue severely under such circumstances that he claimed Foster was negligent. The insurer filed an action for a declaratory judgment in the United

States District Court for the District of Kansas, which rendered judgment for the insurer, plaintiff therein. (31 Fed. Supp. 873.)

In affirming judgment for the insurer the Circuit Court of Appeals for the Tenth Circuit borrowed a paragraph from the opinion of the Supreme Court of Kansas in a similar case, *Smith v. Republic Underwriters*, 152 Kan. 305, 103 Pac. (2d) 858, 860:

“Having given consideration to the commercial operations provided for in the certificate or permit—and therein specifically set out—the company issues a policy covering vehicles engaged in such operations. *It does not insure vehicles otherwise engaged—that is, which are being used for commercial, personal or social purposes outside the operations covered by the permit. Or, as the indorsement has it, the policy covers vehicles being operated ‘pursuant to the permit’.* Accordingly, *in determining whether there was insurance coverage, a material question was whether the vehicle, at the time of the accident, was being operated under or pursuant to the permit.*” (Italics supplied by the Circuit Court.)

Referring to limitation of coverage provisions in Kansas carrier policies whereby it was provided that coverage should cease when and if the vehicles were withdrawn from public carrier service, the Supreme Court of Kansas in *Smith v. Republic Underwriters*, supra, said:

“There is nothing novel in the limitation of coverage contained in the instant indorsement. For instance, provisions are common which limit coverage to specified use of the vehicle. In fact,

the instant provision is really one as to *use*. (Citing authority.) To disregard this limitation in the policy or to hold it invalid would constitute an attempt to expand the insurer's liability, and if accepted by the insurance carrier, an increase in the premiums would inevitably result."

Smith v. Republic Underwriters, 152 Kan. 305, 103 Pac. (2d) 858, 860.

It thus appears that even in Kansas, in spite of Rule 24 of the Kansas Corporation Commission (as cited in the *Foster* case, *supra*), which makes an injured third party's right of action against the insurer all but absolute, coverage is extended to the insured vehicles only when being actually used in public carrier service, not when being used for other commercial purposes or for pleasure. Such a situation even if our own Railroad Commission had its own Rule 4 comparable to that of Kansas, would not benefit appellants herein, inasmuch as defendant Tunzi's truck and trailer, driven by Denman R. Curry, were not being used in the public carrier service at the time of the accident.

II.

NEITHER THE CALIFORNIA AUTHORITIES NOR THOSE FROM OTHER STATES CITED AND DEPENDENT UPON BY APPELLANTS ARE IN POINT NOR ARE THEY DECISIVE OF ANY QUESTION INVOLVED IN THIS APPEAL.

It is significant that, aside from the Highway Carriers Act itself, and though only questions of California law are involved, appellants cite only three

California authorities, *Consolidated Shippers v. Pacific Employers Ins. Co., et al.*, 45 Cal. App. (2d) 288, 114 Pac. (2d) 34; *Hynding v. Home Acc. Ins. Co.*, 214 Cal. 743, 7 Pac. (2d) 999, and *Kruger v. California Highway Indemnity Exchange*, 201 Cal. 672, 258 Pac. 602. The first is an action by an assured (not by an injured third party) brought against two insurance companies under the Federal Motor Carrier Act of 1935 (49 U. S. C. A., Sec. 315) and the rules and regulations of the Interstate Commerce Commission; the second involves a voluntary or private insurance policy, the words cited by appellants' brief (p. 14) being dicta, and the third, an action on a judgment in an action based upon the "Jitney Bus Ordinance" of the City and County of San Francisco, which required jitney drivers to deposit with the municipal police commission a bond or insurance policy differing materially from the one involved in the case at bar. Following is a brief summary of the above mentioned cases:

Consolidated Shippers v. Pacific Employers Ins. Co. and Commercial Standard Ins. Co., 45 Cal. App. (2d) 288, 114 Pac. (2d) 34, cited on page 14 of appellants' brief. This is an action brought by an interstate carrier against two liability insurance companies. The assured, which had paid a judgment rendered against it in Arizona, was licensed under the Federal Motor Carrier Act of 1935 (49 U. S. C. A., Sec. 315). It had been unable to indemnify itself because of a dispute between the insurers as to whether the loss should be prorated, or, in the case of the second insurer, treated as excess insurance.

The case is not brought under the California Highway Carriers Act nor does it involve any breach of either policy by the assured.

The case is excluded as an authority favorable to appellants herein by the following endorsement affixed to one of the policies by order of the Interstate Commerce Commission:

“Nothing contained in the policy or any other endorsement thereon, nor the violation of any of the provisions of the policy or of any endorsement by the insured, shall relieve the company from liability hereunder or from the payment of any such final judgment.”

No such provision appears in the California Highway Carriers Act or in the insurance policy involved herein.

Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 7 Pac. (2d) 999, cited on page 17 of appellants' brief. This is a leading “failure to cooperate after the accident” case. The policy was a voluntary one, and as much of the opinion as refers to statutory policies is dicta, principally based upon *Kruger v. California Highway Indem. Exchg.*, which is summarized in the following paragraph:

Kruger v. California Highway Indem. Exchg., 201 Cal. 672, 258 Pac. 602. By the words printed in italics at the bottom of page 18 of appellants' brief, the *Kruger* case is excluded from the list of cases available to appellants herein:

“The latter's failure to perform his part of the agreement cannot in any way affect appellant's

liability to third persons expressly and unconditionally assumed by the terms of the policy."

In the instant case there is no "liability to third persons expressly and unconditionally assumed." Appellants on page 18 of their brief speak of the jitney bus driver as being required to carry "the type of insurance involved in this appeal." As a matter of fact it would be difficult to imagine liability policies more dissimilar, for in the *Kruger* case a judgment had been rendered against the insured jitney driver. The policy contained a provision *guaranteeing* the payment of such judgment direct to the plaintiff securing same, thus making it one of guaranty and depriving the insurer of any defense whatsoever. Therefore judgment was rendered on the pleadings.

One Delaney, a jitney bus driver, negligently injured Mrs. Kruger, who brought the action against him. Delaney was served, but did not deliver the papers to the insurer. Mrs. Kruger's attorney took a default judgment, waited six months until it had become final and then brought the action. In the *Kruger* case the contract was in effect one of guaranty or surety rather than of insurance.

Most of the cases from other jurisdictions cited by appellants, merely support the statement of some principle or rule of law. *McDonald v. Lawrence*, 100 Wash. 215, 170 Pac. 576, is an exception. Appellants call attention to the fact that in this Washington case when the evidence as to whether a truck was leased or the driver employed was susceptible of one of two constructions, the Court stated it would hold as a

matter of public policy that the contract was one of employment. The situation in the case at bar is different. As the trial Court says in his opinion (R. 57) the plaintiff made out a *prima facie* case that the truck and trailer were “rented under contract or leased”, which defendants Tunzi and Curry did not attempt to controvert, though, they, and they alone, were in possession of all the evidence bearing on the subject.

III.

AN EXAMINATION OF CALIFORNIA PUBLIC AUTOMOBILE LIABILITY INSURANCE LAW DISCLOSES NO ERROR IN THE TRIAL COURT'S DECISION.

Throughout their brief, as previously stated, appellants contend that this case should have been decided by a general rule of law to the effect that “no breach of the terms of a compulsory or statutory policy by the assured can affect the right of an injured third party to recover under the policy”. If that be true an examination of California statutes governing automobile liability insurance should reveal the fact.

- a. California has never attempted by statute to regulate the rights of injured third parties against the insurer under statutory or compulsory public liability insurance policies exclusively.

In California such statutes as have been enacted to confer rights upon injured third parties as against the insurer do not distinguish compulsory policies from voluntary ones, or discriminate for or against either.

In this state until 1919 public liability policies were strictly held to be contracts of indemnity, and conferred no rights whatever upon third parties negligently injured or damaged by an assured. (*Treloar v. Keil & Hannon* (1918), 36 Cal. App. 159, 171 Pac. 823.) The Legislature of 1919 enlarged the rights of injured third parties by enacting Stats. of 1919, p. 776, later incorporated into the Insurance Code as Section 11580. This act provides that no public liability insurance policy shall be issued in California unless it contains (among other things):

“(2) A provision that whenever judgment is secured against the insured in an action brought by the injured person, or by his heirs or personal representatives in case death results from the accident, then an action may be brought against the insurer, on the policy *and subject to its terms and limitations*, by such judgment creditor to recover on the judgment.” (Italics ours.)

(Insurance Code, Sec. 11580.)

The foregoing act is construed and analyzed in *Malmgren v. Southwestern Automobile Ins. Co.*, 201 Cal. 29, 255 Pac. 512 and *Hynding v. Home Accident and Insurance Co.*, 214 Cal. 743, 7 Pac. (2d) 999, the latter being one of the authorities depended upon by appellants herein. (See Appellants’ Opening Brief, p. 17.) It will be noticed that any rights conferred upon third parties by the act are “subject to its [the policy’s] terms and limitations.”

While the Legislature of California has never attempted by any general law to confer any special rights upon injured third parties as against the in-

surer under compulsory liability policies, in at least two instances California municipalities have done so by the passage of ordinances regulating jitney busses. These cities are San Francisco and Los Angeles. The ordinance of the latter city even provides for the joinder of the insurer with the assured as co-defendant in the tort action to determine the negligence of the assured. (*Milliron v. Dittman*, 180 Cal. 443, 181 Pac. 779.) The San Francisco jitney bus ordinance follows the same general lines and liability policies issued under it are in effect contracts of guaranty or surety rather than indemnity insurance. It is from this ordinance and a policy issued under it that the case of *Kruger v. California Highway Indem. Exchg.*, supra, and numerous dicta in California Reports arose. These so-called jitney bus ordinances have no counterpart in the statutes of California.

IV.

IN CALIFORNIA THE CORRECT RULE FOR CONSTRUING STATUTORY PUBLIC LIABILITY POLICIES IS THAT THE POLICY AND THE STATUTE COMMANDING IT SHOULD BE READ TOGETHER AS ONE INSTRUMENT.

Though still adhering to their theory that rights and liabilities under the policy in question are concluded by a general rule to the effect that no breach of a compulsory policy by the assured can affect the rights of an injured third party, appellants, curiously enough, on page 10 of their brief print the correct rule for construing statutory policies, being so much of the last paragraph on page 10 as reads:

“* * * the obligations of such a policy as the one under consideration here are measured and defined by the pertinent statute and the two together form the insurance contract * * *”

In support of this rule three authorities are cited by appellants:

Schulte v. Great Lakes Forwarding Corp., 288

Iowa 1012, 291 N. W. 158;

Commercial Standard Ins. Co. of Fort Worth v. Foster, 121 Fed. (2d) 117;

Hipp v. Prudential Cas. and Surety Co. of St. Louis, 60 S. D. 300, 244 N. W. 346.

In Iowa the rule has been stated thus:

“It is well settled that the liability of a surety under a statutory bond is measured and defined by the statute requiring the bond. Additions to the bond will be treated as surplusage, and omitted provisions will be read into it. (Citing cases.) The Railroad Commission, although it was directed by statute to approve the form of the bond, had no power to authorize a departure from the requirements of the statute.”

Curtis v. Michaelson, 206 Ia. 48, 219 N. W. 49, 52.

In California, as in many other states, the rule is one of decisions rather than statute:

“It is true, as the appellants contend, that the general rule is to the effect that the liability of sureties cannot be extended beyond the fair import of the express undertaking in the bond. There is, however, an exception to this general

rule in the case of bonds given in pursuance of a governmental law for a public purpose. The exception is clearly and concisely stated in the case of *State v. Nutter*, 44 W. Va. 385, 30 S. E. 67, where it is said: 'The law in force at the date of a public bond, fixing a certain condition for it saying what its obligations shall be, is a part of it as effectually as if such obligations were in words inserted in it. * * * By signing, the parties adopt the law as a part of the bond. If we do not so hold, we frustrate the plain purpose of the statute.' (Citing other authority.)

"Of course, this exception to the general rule would have no application where its undoubted effect would be to impose a liability necessarily and absolutely inconsistent with the unequivocal intent of the parties as disclosed by the express terms of the bond itself. (Graeter v. DeWolf, 112 Ind. 1, 13 N. E. 111.)" (Italics ours.)

Milliron v. Dittman, 180 Cal. 443, 445, 181 Pac.

779.

Sections 5, 6 and 7 of the California Highway Carriers' Act in compliance with which the policy herein was written are as follows:

"Sec. 5. The Railroad Commission shall, in granting permits under the provisions of this act, require the highway carrier to procure, and continue in effect during the life of the permit, adequate protection, as required in section 6 hereof, against liability imposed by law upon such highway carrier for the payment of damages for personal bodily injuries (including death resulting therefrom) in the amount of not less than five thousand dollars on account of bodily in-

juries to, or death of, one person; and protection against a total liability of such highway carrier on account of bodily injuries to, or death of, more than one person, as a result of any one accident, in the amount of not less than ten thousand dollars; and protection in an amount of not less than five thousand dollars for one accident resulting in damage or destruction of property whether the property of one, or more than one claimant.

Sec. 6. The protection required under section 5 shall be evidenced by the deposit with the Railroad Commission, covering each vehicle used or to be used under the permit applied for, of a policy of public liability and property damage insurance, issued by a company licensed to write such insurance in the State of California; or of a bond of a surety company licensed to write surety bonds in the State of California; or of a personal bond, with such sureties as the Railroad Commission shall find adequate to guarantee the protection prescribed in section 5 hereof; or it shall be evidenced by a trust fund in the amount of fifteen thousand dollars, to be held in trust by some institution or person acceptable to the Railroad Commission; or by a combination of any of or all of said methods in such manner that the aggregate of the protection or funds available therefor shall equal the principal sum of not less than fifteen thousand dollars, and such highway carrier shall have the option of the method to be used in obtaining such protection, and may change from one method to another from time to time, with the consent of the Railroad Commission. With the consent of the Railroad Commission a copy of an

insurance policy, duly certified by the company issuing it to be a true copy of the original policy, or a photostatic copy thereof, or an abstract of the provisions of said policy, or a certificate of insurance issued by the company issuing such policy, may be filed with the Railroad Commission in lieu of the original or a duplicate or counterpart of said policy.

Sec. 7. The protection against liability as outlined in section 5 hereof must be continued in effect during the active life of the permit, and the policy of insurance, surety bond or personal bond shall not be cancellable on less than ten (10) days' written notice to the Railroad Commission. The Railroad Commission shall have power to establish such rules and regulations as may be necessary to carry out the provisions of sections 5 to 7 inclusive."

It will be noted that Section 5 merely directs that the Railroad Commission shall, in granting permits under the provisions of the act, require the highway carrier to procure and continue "adequate protection as required in Section 6", against liability for personal injuries, death or property damage in the amounts prescribed. The protection required in Section 5 is stated in Section 6 to be "evidenced by the deposit with the Railroad Commission, covering each vehicle used or to be used under the permit applied for, of a policy of public liability and property damage insurance, issued by a company licensed to write such insurance in the State of California; or a bond", etc. Section 7 forbids cancellation of the policy ex-

cept on not less than ten days' written notice to the Railroad Commission, and closes with the sentence:

“The Railroad Commission shall have power to establish such rules and regulations as may be necessary to carry out the provisions of Sections 5 to 7, inclusive.”

This grant of authority, it will be noticed, is not mandatory. If such rules have been formulated they were not introduced in evidence at the trial. However, the policy as it stands, warranties and exclusion clause included, was accepted and filed by the Railroad Commission, and as appellants remark on page 12 of their brief, the Termination of Coverage endorsement was without doubt required by the Commission. This would include the last sentence reading:

“It is further agreed that it is not the intention of this endorsement to alter the exclusions of the policy of which it forms a part.” (R. 17-18.)

Reading the foregoing Sections 5, 6 and 7 of the Act together, there appears no word, clause or sentence which supports appellants' alleged rule of law to the effect that “no breach of the terms of a compulsory or statutory policy by the assured can affect the right of an injured third party to recover under the policy”. Second, nowhere is there any provision which would bar the Railroad Commission from accepting as adequate security such policies as that involved in the instant case. A business element enters the picture here. A public contract hauler or carrier with two trucks and trailers carrying freight

north and south between, say, San Diego and Redding, would have to pay \$1000.00 a year for his liability insurance. Another public hauler whose business was more localized and could carry on without going more than 100 miles from his garage could operate the same two trucks and trailers with an expense for insurance of but \$387 per annum. (R. 118.) Where the needs of the respective haulers are so different, is it not perfectly reasonable that the short haul trucker should receive his permit from the Railroad Commission upon depositing a liability policy with a lower premium and bearing endorsements regulating the place of garaging and limiting the radius of operation? And having procured such a policy is he to be permitted without paying additional premium, to use it as insurance for 500 mile hauls, as was attempted in this case?

V.

APPELLANTS' INTERPRETATION OF THE "TERMINATION OF COVERAGE ENDORSEMENT" IS NOT IN ACCORDANCE WITH THE LANGUAGE THEREOF.

On page 11 of their brief (Summaries C and D) appellants maintain that under the provisions of the termination of coverage endorsement (R. 17) (which might more appropriately be termed a "Cancellation of Policy Endorsement") appellee is liable on its policy regardless of violations of warranties by its assured. In appellee's opinion such an interpretation is not reasonable inasmuch as the endorsement, by its express terms, applies only to (1) "such public lia-

bility and property damage liability insurance *as is afforded by the policy*", not to such absolute liability as appellants contend for, and (2) the endorsement ends with a sentence reading:

"It is further agreed that it is not the intention of this endorsement to alter the exclusions of the policy of which it forms a part."

That this endorsement is not what appellants contend is well illustrated by comparing it with one intended to create an absolute liability in the State of Indiana and printed as a note to the opinion in *Hendell v. State Farm Auto Insurance Co.*, 97 Fed. (2d) 777, at page 779.

"Motor Vehicle Form No. 6-A
Insurance Policy Endorsement

"Nothing contained in the policy or any endorsement thereon, nor the violation of any of the provisions thereof or of any law of the State by the assured shall relieve the insurer from any liability hereunder or from the payment of any such judgment.

"No condition, provision, stipulation or limitation contained in the policy or any other endorsement thereon, nor the violation of any of the same by the insured shall affect in any way the right of any person injured in his person or property by the negligence of the insured or relieve the company from the liability provided for in this indorsement, or from the payment to such person of any such judgment, to the extent and in the amounts set forth in the schedule shown hereon; but the conditions, provisions, stipula-

tions and limitations contained in the policy and any other indorsements thereon shall remain in full force and be binding as between the insured and the company.”

Hendell v. State Farm Auto Insurance Co., 97 Fed. (2d) 777, at page 779.

Appellee submits that a comparison of this endorsement in the *Hendell* case with the one attached to the Tunzi policy herein demonstrates beyond question that the latter was never intended to deprive the insurer, as against an injured party, of any defense based on breach of warranty or violation of the exclusion clause.

(NOTE: In the reproduction of the “Termination of Coverage Endorsement” in appellants’ brief, page 4, ninth line from top, the word “insurance” has been omitted after the word “liability”, making the first clause of the sentence meaningless. The same error occurs in appellants’ brief, page 11, sixteenth line from top of page. As correctly printed in the record, page 17, the first four lines read:

“It is agreed that such Public Liability (Bodily Injury Liability) and Property Damage Liability *Insurance* as is afforded by the policy shall not terminate”, etc.)

VI.

CONCLUSION.

As appellants' brief is confined to practically one point of law—that under statutory policies the rights of injured third parties are absolute—appellee's brief necessarily follows the same pattern, perhaps to the extent of obscuring appellee's contentions at the trial, which were (1) that the policy was breached by removal of place of garaging from Novato; (2) that the policy was further breached by repeated use of the insured vehicles outside the prescribed 100 mile radius; (3) still further breached by hiring truck and trailer to Curry, who received no instructions as to their use, except that he should take good care of them (R. 112); (4) that as Curry removed truck and trailer from public carrier service two weeks before the accident, they were being operated at that time as private trucks, and not under the Highway Carriers' Act. In this connection it should be noted that Curry was never an assured of appellee, nor did he have a highway carrier's permit or the license plates that go with such permit.

In their brief appellants' have not argued the legal effect of discontinuing garaging at Novato or of operating truck and trailer outside the 100 mile radius limit of the policy, therefore appellee has not done so in its brief. However, the principal authorities cited by appellee to the trial Court as to the foregoing matters are as follows:

As to the breach of both warranties and the violation of the exclusion clause:

Insurance Code of California:

“Sec. 445. A statement in a policy, which imports that there is an intention to do or not to do a thing which materially affects the risk, is a warranty that such act or omission will take place.

“Sec. 447. The violation of a material warranty or other material provision of a policy, on the part of either party thereto, entitles the other to rescind.

“Sec. 449. A breach of warranty without fraud merely exonerates an insurer from the time that it occurs, or where the warranty is broken in its inception, prevents the policy from attaching to the risk.”

As to breach of the 100 mile radius of operation clause and removal of place of garaging from Novato:

Kindred v. Pac. Auto. Ins. Co., 10 Cal. (2d) 463, 75 Pac. (2d) 69;

Purcell v. Pacific Auto Ins. Co., 19 Cal. App. (2d) 230, 64 Pac. (2d) 1114.

Hynding v. Home Acc. Ins. Co., 214 Cal. 743, 7 Pac. (2d) 999, *supra*. (Injured third party bound by warranties, exclusions and limitations contained in liability policy.)

Royal Ins. Co. v. Morris, 37 Fed. (2d) 90. (Injured third party cannot recover from insurer under a breached policy, he being in no better position than the assured.)

As to renting or leasing under contract or hiring:

“Civil Code of California, Sec. 1925: Hiring is a contract by which one gives to another the temporary possession and use of property, other

than money, for reward, and the latter agrees to return the former at a future time.”

Aetna Casualty and Surety Co. v. Howell, 108
Fed. (2d) 148, 149;

Aetna Casualty and Surety Co. v. Patton, 247
Ky. 370, 57 S. W. (2d) 32.

For the reasons heretofore recited it is respectfully submitted that the judgment of the District Court should be affirmed.

Dated, San Francisco,
March 1, 1943.

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Attorneys for Appellee.

No. 10,286

14

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

EUGENE J. WESTPHALEN, CHARLES ZANELLA,
and AETNA CASUALTY AND SURETY COM-
PANY (a corporation),

Appellants,

VS.

BANKERS INDEMNITY INSURANCE COMPANY
(a corporation),

Appellee.

APPELLANTS' REPLY BRIEF.

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vs.

BANKERS INDEMNITY INSURANCE COMPANY
(a corporation),

Appellee.

APPELLANTS' REPLY BRIEF.

In its final analysis there are but two points to be considered in this appeal. The first involves the right of an insurance company by the inclusion of clauses and limitations in compulsory or statutory policies of liability insurance which so restrict its obligations and liability to the public generally as to nullify and set aside the expressed purposes and objects of the statute which require the issuance of the policies to enable the insured to procure the necessary permit to engage in the business of highway carrier in California; and, second, the point raised for the first time in its brief in this Court by appellee that because the truck and trailer concerned in this litigation were being used at the time of the accident complained of

the purpose of delivering merchandise purchased by the operator so modified the classification of the assured as to render the owner and operator not highway carriers within the meaning of the act and thus relieved the appellee of its obligations under the policy to appellants.

As to the first proposition, appellants respectfully refer the Court to their opening brief and the citations there cited and quoted and again submit that the limitations relied upon by appellants are contrary to the spirit, purposes and objects of the regulatory statute through the requirements of which the policy was issued and for that reason are void and of no effect and unavailing as a defense to appellee so far as the rights of appellants are concerned.

As to the second proposition that the owner and operator of the truck had abandoned their classification as highway carriers some two weeks prior to the accident by reason of the fact that the operator, Curry, had commenced to deliver to the farmers of Napa and Sonoma Counties grape stakes which had been purchased by him in Mendocino and Humboldt Counties, appellants submit that this point, which was raised for the first time in the brief of appellee in this Court, does not operate to relieve appellee of its liability to appellants.

The California Highway Carrier's Act, cited and quoted in the briefs of both appellants and appellee provides in no uncertain terms that in order for a highway carrier to obtain a permit to operate a truck in California that he procure and *continue in effect during the life of the permit adequate protection*

(italics ours) against liability imposed by law for the payment of damages for personal bodily injury (or death) or for damages or destruction to personal property in amounts specified in the act. It can be asserted without fear of contradiction that the policy under consideration was issued because of the requirements of this statute and that it was so issued to the owner Tunzi, and later by endorsement to Peterson, as highway carriers. That these men were such highway carriers cannot be questioned. There is an abundance of evidence to the effect that Curry, the operator of the truck at the time of the accident was likewise engaged in the business of highway carrier under the permit issued to Tunzi (testimony of Curry, Tr. p. 101) and that he made at least several trips with the truck and trailer as such highway carrier transporting goods and merchandise for hire was amply established at the trial. (Testimony of Kay, Tr. p. 95.)

We have been unable to locate any decisions of the Courts in California directly in point or which have a direct bearing on this question. It has been held, however, in numerous cases that a deviation of a specified route by a motor vehicle insured under a statutory policy of liability insurance or the fact that the insured vehicle at the time of the accident out of which the cause of action arose was either not directly engaged in the business of transporting passengers for hire or had deviated from a specified course, would not relieve the insurer of liability under its policy of insurance.

Smith v. California Highway Indemnity Exchange, 218 Cal. 325, 23 Pac. (2d) 274;

Connell v. Commonwealth Cas. Co. (N. J.), 115
Atl. 352;

Devlin v. Herr (N. J.), 119 Atl. 446.

Where a motor carrier files a liability insurance bond with the commission as a prerequisite to the issuance of a certificate, neither the carrier or its bondsmen may successfully contend that the bond limits the liability imposed by statute, except as to the amount.

Utilities Ins. Co. v. Potter, 105 Pac. (2d) 259.

The tendency of more recent decisions is to permit recovery even though the designated route was not exactly followed.

Lopez v. Townsend, 25 Pac. (2d) 809, 37 New
Mexico 574.

CONCLUSION.

Appellants respectfully submit that the judgment of the lower Court should be reversed.

Dated, Oakland, California,
March 19, 1943.

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Journal of Management Inquiry 18(6)

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